Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom

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Stefano, an Italian lawyer, arrives at a U.S. law school to work toward his LL.M. in common law studies. His English is excellent, and he is eager, dedicated, and quick. Although he has worked two years for an American law firm in Milan, he finds his first serious research and writing assignment to be excruciating. His short memo is returned, marked as "conclusory"; he has moved too quickly from statute to conclusion, say the comments. And he has failed to investigate persuasive jurisdictions on this topic. He is utterly baffled.

Huang Lee has just received a Korean law degree. When he arrives at a U.S. law school and first encounters a casebook, he reads each word as equally important. He summarizes cases and offers reports of his research as memos in a legal writing course. Exams, he thinks, will test him on what was covered in class and in the textbook; he need only study his notes and his book and repeat those concepts. He does not expect to speak to or know a professor; he expects only to work hard, read well, and, by doing so, learn U.S. law. He does very poorly on his exams, despite his hard work. He is embarrassed and dishonored.

Janice, a native of Nebraska, graduated magna cum laude from an excellent undergraduate college in the United States. She has always wanted to be a lawyer and has worked during the summers in her uncle's law firm. Entering law school, she feels she must have an advantage because of her interest and experience. Yet she receives several negative comments on her first papers: "incoherent," "underresearched," "poorly organized." She has never before received such criticism, yet she has worked even harder in law school than in college. Her confidence begins to slip.

These scenarios occur frequently enough in U.S. law schools. Both international and U.S. students arrive with preconceived notions about how law

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works, how a law class will operate, and how well they will perform.[1] Too often they are baffled and confused about all three. We teach inductively, giving students little pieces of doctrine, convention, and practice, asking them to put the pieces together. We reward those who do so quickly. This method resembles a scientific approach, where the observer collects data and poses a theory that explains the data, much as lawyers must do when they "observe" the client's account of what happened and connect that account with the law it invokes. Our inductive approach works well with some students.

It does not work well with others. International students may need more explicit cues about our legal culture. Their motivations for studying here are not mysterious. They are encountering U.S. lawyers and scholars in professional settings, business arrangements, scholarly exchanges, and international courtrooms. International issues are in turn invading our classrooms, whether or not international lawyers bring them. The fact is, international law practice may well dominate legal practice in the next century. International markets are opening rapidly, creating an unprecedented increase in international trade. International businesses are creating their own international transactions, and the U.S. legal community is reacting. Some U.S. law firms have opened offices worldwide, hired lawyers from other countries, and created international law departments. Law schools are including international law as a permanent part of their curricula and expanding their programs abroad. U.S. law schools in turn are attracting more international students who wish to study the U.S. legal system so that they can eventually negotiate transactions between companies in their own countries and those in the U.S., seek redress in U.S. courts, or write new constitutions and laws by referring to U.S. examples. As these international students enter the U.S. law classroom, they bring with them the richness of their own legal and business cultures and the opportunity for us to explore diverse ideas and worldviews.

They also bring their own logic. That "logic" is perfectly sound, rooted in a particular legal culture, but it may create peculiar cross-cultural analytical clashes. At first, these clashes may appear to be confined to the English as a Second Language classroom. Traditionally, international students were farmed out to ESL grammar classes to improve their English "skills." This did not work. Then linguists paid more attention to the way English was used in particular professions, or ESP—English for Specific Purposes.[2] ESP studies revealed a great deal about teaching international students and helped to develop the concept of *discourse community*. Those studies did not, however, explain the cultural clashes in rhetoric or logic.

The native speaker may be experiencing a similar cultural clash. All law students arrive with "rhetorical preferences" derived from their own cultural

1. In this article the term "international student" refers both to the non-native speaker of English and to the student who has not been raised in the United States. "U.S. student" refers to native speakers of English who have been raised in the United States.

2. This is the term used by linguists to describe how English is used by second-language learners in particular discourse communities, e.g., business English, scientific English, academic English. See, e.g., English for Specific Purposes, eds. J. Ronald Mackay & Aland J. Mountford (London, 1978).

experiences and from the discourse communities in which they have studied before reaching law school. Those with cultural backgrounds that track traditional legal norms find the territory familiar; those students whose backgrounds are completely nonlegal may struggle more. Many U.S. students, like international students, may also feel that the law school experience is—as one student put it—"like writing left-handed."

Contrastive approaches put cultural and disciplinary differences in constructive relief. Contrastive theories reveal the roots of our own logic; our experiences with rhetorical preferences in the law classroom reveal our own biases and omissions. Contrastive approaches can close the gap between legal cultures and between the initiated and uninitiated. We can use contrastive approaches to hasten acculturation of the international student into the U.S. legal community without losing or damaging his native analytical paradigms, and of the native speaker without losing or damaging her cultural references. The contrasts should enhance our understanding of currently acceptable analytical paradigms in the U.S. legal culture. They should illuminate various aspects of legal systems across cultures, including not only the written law itself, but also the relative functions of judges, legislatures, and the executive. With contrastive insight, we should be better able to see the possibilities for predicting results in international transactions, creating circumstances for effective international arbitrations, and summoning the appropriate language to draft international law. We should, in short, be better able to teach both international and U.S. students. With contrastive insight as the mirror to our thinking, we should be better able to see the possibilities for a richer "logic."

I. Contrastive Approaches Defined

Historically, educators focused their efforts with international students on English usage, not on logic. They concentrated on formal approaches for teaching or reviewing grammar.[3] The idea seemed to be that by fixing the grammar, they would improve the writing. But most studies of ESL learning suggest that the problem, especially at postsecondary levels, is more complex, requiring teachers to pay attention to such matters as sequencing of complex structures,[4] to be sensitive to social and cognitive factors,[5] and to be aware of their own subjectivity.[6] There was much more to come.

3. See, e.g., Betty Wallace Robinett, Teaching English to Speakers of Other Languages: Substance and Technique 244 (Minneapolis, 1978); Toshihiko Kobayashi, Native and Nonnative Reactions to ESL Compositions, 26 TESOL Q. 81 (1992).

4. See, e.g., Anuradha Saksena, Linguistic Models, Pedagogical Grammars, and ESL Composition, 22 IRAL 137 (1984); Craig Chaudron, Language Research on Metalinguistic Judgements: A Review of Theory, Methods, and Results, 33 Language Learning 343 (1983).

5. John H. Schumann, Social and Psychological Factors in Second Language Acquisition, *in* Understanding Second and Foreign Language Learning, ed. Jack C. Richards, 163 (Rowley, 1978). Schumann offers a taxonomy of the following factors that influence second-language acquisition: social, affective, personality, cognitive, biological, aptitude, personal, input, and instructional.

6. Terry Santos, Professors' Reactions to the Academic Writing of Nonnative-Speaking Students, 22 TESOL Q. 69, 81–84 (1988).

Work in ESL has always relied on studies done with native (L1) speakers.[7] Study of how L1 speakers learn to write initially focused on children,[8] but recent work has examined both postsecondary education[9] and adult learning.[10] Influential in developing strategies for teaching postsecondary ESL students were L1 writing and composition studies, which moved classrooms away from a formal, product-oriented model of teaching analysis and writing to a process view, which focused on the person's thinking and composing behaviors.[11] Those studies then led to a social view of teaching analysis in composition, which defines writing as a context-based, social act.[12] For international students, these views meant that their writing and thinking needed to incorporate more than study of English usage. Instead, their success as communicators in the U.S. setting depended on their understanding of U.S. intellectual context, culture, tradition, language, norms, and models of reasoning, or analytical paradigms. They were initially left to their own methods of inferring and understanding, but these make-do methods were not effective.

In 1966, Robert B. Kaplan introduced the concept of contrastive rhetoric, which suggested that analytical paradigms are based in culture, that there is no inherent "logic" in thought, but that cultures create their own "logic" in

7. As "L1" denotes native speakers, "L2" is another term for ESL learners. See, e.g., Molly Mack, Theoretical Linguistics and Applied Linguistics Research: Perspectives on Their Relationship to Language Pedagogy, 5 Ideal 65 (1990). The distinction becomes even more refined with use of "EFL"—English as a Foreign Language—because these students are learning English in a foreign country.

8. See, e.g., L. S. Vygotsky, Thought and Language, trans. Eugenia Hanfmann & Gertrude Vakar (Cambridge, Mass., 1962); Arthur N. Applebee, Writing in the Secondary School (Urbana, 1981); Carol Burgess et al., Understanding Children Writing (Harmondsworth, 1973); Shirley Brice Heath, Ways with Words: Language, Life, and Work in Communities and Classrooms (New York, 1983); James Britton et al., The Development of Writing Abilities 11–18 (London, 1975); John Richmond & Alex McLeod, Craft in Children's Writing, English Mag., Jan. 1981, at 65.

9. See, e.g., Barbara Albrecht McDaniel, Contrastive Rhetoric: Diagnosing Problems in Coherence, 13 English Q. 65, 65 (1980); Ellen Bialystok, The Role of Conscious Strategies in Second Language Proficiency, 35 Can. Mod. Language Rev. 372 (1979); Jeff Connor-Linton, Pragmatic Analysis in the Second Language Classroom, 4 Ideal 37 (1989); Christopher Ely, An Analysis of Discomfort, Risktaking, Sociability, and Motivation in the L2 Classroom, 36 Language Learning 1 (1986); Ilona Leki, Twenty-five Years of Contrastive Rhetoric: Text Analysis and Writing Pedagogies, 25 TESOL Q. 123 (1991); Patsy M. Lightbown, Great Expectations: Second-Language Acquisition Research and Classroom Teaching, 6 Applied Linguistics 173; Ann Raimes, Out of the Woods: Emerging Traditions in the Teaching of Writing, 25 TESOL Q. 407 (1991); Schumann, *supra* note 5; Tony Silva, Toward an Understanding of the Distinct Nature of L2 Writing: The ESL Research and Its Implications, 27 TESOL Q. 657 (1993).

10. See Malcolm Knowles, The Adult Learner: A Neglected Species, 4th ed. (Houston, 1990).

11. Teresa Godwin Phelps, The New Legal Rhetoric, 40 Sw. L.J. 1089 (1986); Lester Faigley, Nonacademic Writing: The Social Perspective, *in* Nonacademic Settings, eds. Lee Odell & Dixie Goswami, 231 (New York, 1985); Lester Faigley & K. Hansen, Learning to Write in the Social Sciences, 136 C. Composition & Comm. 140 (1985); J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35 (1994).

12. Rideout & Ramsfield, *supra* note 11; see also Patricia Bizzell, Cognition, Convention, and Certainty: What We Need to Know About Writing, 3 PRE/TEXT 213 (1982).

problem-solving. If logic is culture based, Kaplan reasoned, then educators must consider and contrast those bases in introducing U.S. thought patterns.[13] Kaplan's theory spawned considerable study of contrastive rhetoric, or comparative rhetorical preferences, as researchers tried to go beyond lexical concerns to discover analytical paradigms used in different cultures.[14]

Two other movements enhanced work with international students: Writing Across the Curriculum and English for Specific Purposes.[15] WAC was concerned primarily with native speakers, ESP with non-native speakers. Nevertheless, the two overlap in such matters as how to assess students' success in communicating and how to train faculty in discourse analysis, ethnography, and methodology.[16] The WAC movement encouraged student writing in all subjects, and the results were positive. For example, students who wrote in biology classes performed better than when they did not write.[17] Researchers also discovered that ESP created specific registers that themselves needed study. Both movements advocated writing as an integral part of learning. And the more the researchers narrowed their focus to specific lexical concerns, the more they realized that the use of English for specific purposes required examination of deeper rhetorical choices.[18]

What does this mean for the U.S. law classroom? In fact, each learner, whether a native or a non-native speaker of English, is encountering a new culture, a new English, and new rhetorical preferences. Each must understand rhetorical considerations that in themselves define the U.S. legal community. These include questions of purpose, audience, scope, ethos, and ethics. While the U.S. community insists on original analysis and celebration of individual thought, other legal communities expect quotations and arrangement of authority; while U.S. readers expect proper attribution to sources through a specific citation system, other communities may tolerate copying from sources

13. Cultural Thought Patterns in Inter-Cultural Education, 16 Language Learning 1 (1966).

14. Kaplan's article was controversial, first, because it opened the field of language acquisition to a new paradigm itself and, second, because in introducing the concept it may have overgeneralized the thought patterns of other cultures. Kaplan corrected himself in A Further Note on Contrastive Rhetoric, 24 Comm. Q. 2 (1976).

15. The ESP movement examined the use of English in particular settings, beginning primarily with English used in science. See, e.g., Common Ground: Shared Interests in ESP and Communication Studies, eds. Ray Williams et al. (Oxford, 1984); C. L. Barber, Some Measurable Characteristics of Modern Scientific Prose, *in* Contributions to English Syntax and Philology, ed. Frank Behre, 21 (Stockholm, 1962), *reprinted in* Episodes in ESP, ed. John M. Swales, 3 (Oxford, 1985); David Charles, The Use of Case Studies in Business English, *in* The ESP Classroom—Methodology, Materials, Expectations, ed. Gregory James, 24 (Exeter, 1984); Ruth Spack, Initiating ESL Students into the Academic Discourse Community: How Far Should We Go? 22 TESOL Q. 29, 37–38 (1988); Academic Writing in a Second Language, eds. Diane Belcher & George Braine (Norwood, N.J., 1985).

16. John M. Swales, Genre Analysis: English in Academic and Research Settings 6 (New York, 1990).

17. See *id.* at 15 (discussing Thomas N. Huckin, Surprise Value in Scientific Discourse 5 (unpublished paper presented at College Composition and Communication Convention, Atlanta, Ga., Mar. 1987)).

18. See *id.* at 2.

and abbreviated citation. Treatises are not mandatory here as they are in some legal cultures;[19] summarizing—rather than synthesizing—authority is not acceptable here as it is in some legal cultures; and few steps in the reasoning are assumed here as they are in other cultures or disciplines.

For incoming international or U.S. students, this is new. So are the methods required to parse out the relationships between mandatory and persuasive authority or between primary and secondary sources of law, all of which affect the weight, proportion, and utilization of sources in the analytical paradigm. More subtle are the unseen differences between the analytical paradigms, that is, the cultural assumptions inherent in U.S. problem-solving and specifically within the U.S. legal discourse community. For example, consider the following text:

> `If the consumer disagrees with the information in the report, the agency must investigate again.`

The reader may assume that a consumer received a report about a purchase and disagreed with the description of events. Further, he may assume a number of related bits of information: there has been a purchase, there was some trouble about the purchase, the consumer filed a report with an agency, and the agency has already investigated the matter once. He may assume that "agency" refers to a governmental agency appointed by the executive branch of government, and that the consumer has certain rights that are protected by laws and regulations invoked by the agency.

That interpretation will change if he learns that the consumer is a radio station and the agency is the FCC. Now he may assume that other, specific regulations are involved that have to do with radio stations, and that the report may put the station in danger of closing or of paying a fine. And suppose we then add the following information:

> `. . . before it turns over the matter to a criminal court.`

The reader's assumptions may adjust to include the possibility that someone at the radio station committed fraud or that the owner may have committed a white-collar crime. The station's owner may have been duped or may have been involved in an act that violated both a federal statute and state criminal laws. In either case, one needs to understand where agencies fit into the authority hierarchy, how consumer law protects innocent listeners, and how federal administrative law and state criminal law intersect. These assumptions, inherent in the experienced U.S. lawyer's understanding of analytical paradigms, are simply absent for the new law student. A clash can occur.

The cultural clash occurs in more practical terms as well. For an international student, the number of books that hold her country's legal code may be equivalent to one set of state statutes. And her country's one set probably

19. Treatises may be primary law in the international student's analytical paradigm, a source for beginning an analysis and a basis for reaching conclusions. In U.S. law, treatises' secondary and rather remote usage may seem strange to the international student, who here must use them only occasionally or not at all.

exists by itself, published officially: everyone uses the same books. While the systems for setting up the books may be similar to U.S. systems and may offer a good starting point for comparison between cultures, the similarity soon ends. With at least three sets of federal codes by three publishers, fifty sets of state codes, and the varied sets of books and loose-leafs that house federal and state case and agency law, the international student has an exponential number of sources to search for authority. The same may be true for the physics or music major whose scope of undergraduate research was limited. The numbers of these sources affect the analytical paradigm: each student must select authority from a complex set of sources and arrange that authority in a manner that fits with analytical norms used consistently and sometimes exclusively within the U.S. legal discourse community.

Finally, besides learning the interpretive principles and analytical paradigms fostered by federalism, the incoming student must learn the practical aspects of U.S. legal culture. If an international student comes from a community-based legal culture where decisions are rendered orally, he may reserve legal writing for only the most official court proceedings. He may, as a matter of duty in another culture, make the decision for the client, so his written advice may be short and conclusion-centered. The U.S. businessman who decides to go to law school will be similarly baffled by the demand to go beyond a page in explaining what appears to be a simple problem. The tendency in the U.S. legal community to write down not only most communications, but also all steps in those communications, is puzzling to many incoming students. So is such a mundane matter as proofreading. Many cultures do not require flawless presentation, which may be impractical in terms of time and resources. Nevertheless, the international student is faced with cultural clashes that include federalism, its analytical progeny, and U.S. norms and forms.

By using contrastive approaches, we can introduce these aspects of U.S. legal culture and enhance both the international student's and the U.S. student's ability to analyze and communicate effectively. Until now, U.S. law schools have been responding to international students much as colleges and universities responded when international students entered graduate and undergraduate programs in the 1960s. Deans and department heads created special accommodations to help students with English usage alone. They sent students to the English department, hoping they would come back cured. Or they looked the other way and lowered standards for international students. But now we have discovered that more than this patchwork help or a glance at TOEFL scores is necessary.[20] Both international students and the rich array of incoming U.S. students are transforming the U.S.-centered classroom to an international one. The contrastive approaches that emerge from these thirty years of work in language acquisition can resonate nicely in the U.S. law classroom: *discourse community; rhetorical preferences,* including schema theory; and *register,* including genre. Contrastive approaches illuminate and help us

20. The Test of English as a Foreign Language (TOEFL) is given to non-native English speaking students to measure competency in English.

define our preferences and biases; they give us the vocabulary for a dynamic, responsive classroom.

A. Discourse Community

We can explicitly introduce our students to our *discourse community.* In general, a discourse community is a community within a larger culture that has created its own language, forms, and traditions for communicating with each other. Specifically, discourse communities are socio-rhetorical networks that form in order to work toward common goals.[21] Those goals might include a socialization that maintains and recreates a subculture's, such as the legal culture's, social structure and worldview.[22] According to those adopting this perspective on discourse, known as the social view, "discourse operates within conventions defined by communities, be they academic disciplines or social groups."[23] So architects will use language conventions appropriate to their goals, such as postmodern style; psychiatrists will create a discourse that incorporates a particular worldview, such as Freudian interpretation; and so on. Defining a discourse community, then, goes beyond discussing language usage; instead, it means that discourse itself is "a form of social behavior, that discourse is a means of maintaining and extending the group's knowledge and of initiating new members into the group, and that discourse is epistemic or constitutive of the group's knowledge."[24] Writing in a discourse community, then, is not just "an individually-oriented, inner directed cognitive process," but "an acquired response to the discourse conventions which arise from preferred ways of creating and communicating knowledge within particular communities."[25] Writing is a socially situated act.

For any writer, international or not, the initiation into the U.S. legal discourse community is complex and challenging. The initiation involves acquired responses to conventions created by U.S. scholars and lawyers, to new language, and to expected behaviors. This phenomenon explains the difficulty many novices encounter when they enter the community.[26]

For us, the fundamental issue in choosing how to present the notion of discourse community or any of its goals may be whether the target community, the U.S. legal discourse community, is a static entity to which students must assimilate or a dynamic community which itself incorporates the individuals who are becoming its members. In other words, the issue may be "whether we should put our trust in [the discourse] community, or whether we shouldn't rather be attempting to influence and change the academic community for

21. See Swales, *supra* note 16, at 9.

22. See Connor-Linton, *supra* note 9, at 46.

23. Swales, *supra* note 16, at 21 (quoting Bruce Herzberg, The Politics of Discourse 1 (unpublished paper presented at College Composition and Communication Convention, New Orleans, La., Mar. 1986)).

24. See *id.* (quoting Herzberg, *supra* note 23, at 1).

25. See *id.* at 4 (discussing Bizzell, *supra* note 12).

26. Joseph M. Williams, On the Maturing of Legal Writers: Two Models of Growth and Development, 1 Legal Writing 1 (1991).

the benefit of our students, while teaching our students how to interpret the community values and transform them."[27] To internationalize and vitalize the classroom, the latter will be more effective, of course, and contrastive approaches may make the features of the U.S. legal discourse community both more obvious and more open to question.

A discourse community, then, must be well enough defined so that novices can identify its features.[28] International novices particularly need more direction.[29] John Swales offers a conceptualization of discourse community that can be useful in setting up contrastive analysis: A discourse community has a *broadly agreed-upon set of common goals;* has *mechanisms of intercommunication* among its members; uses its participatory mechanisms primarily to provide *information and feedback;* uses and may create one or more *genres* in the furtherance of its aims; has acquired some specific *lexis,* or lexicon; and has a *threshold level of members* with a suitable degree of expertise in the relevant content and the discourse.[30] We can use this terminology with both international and U.S. novices, preferably by introducing the concepts sequentially.[31]

First, the U.S. legal discourse community has a *broadly agreed-upon set of goals,* some of them embodied, for example, in the Model Rules.[32] Other broadly agreed-upon goals include establishing rules, preventing disputes, predicting results, negotiating settlements, and structuring transactions. Within the academic segment of the legal discourse community, the goals include creating

27. Raimes, *supra* note 9, at 416.

> Another thorny problem is whether we view the academic discourse community as benign, open, and beneficial to our students or whether we see discourse communities as powerful and controlling, and, as Giroux puts it, "often more concerned with ways of excluding new members than with ways of admitting them." These opposing views point to the validity of Berlin's statement that every pedagogy implies "a set of tacit assumptions about what is real, what is good, what is possible, and how power ought to be distributed." Teaching writing is inherently political, and how we perceive the purposes of writing vis-a-vis the academic community will reflect our political stance.

Id. (quoting L. Faigley, Competing Theories of Process: A Critique and Proposal, 48 C. Eng. 527, 537 (1986), and citing J. A. Berlin, Rhetoric and Ideology in the Writing Class, 50 C. Eng. 477, 492 (1988)).

28. See Swales, *supra* note 16, at 4–5 (citing Faigley & Hansen, *supra* note 11, at 149).

29. *Id.* at 6.

30. *Id.* at 24–27.

31. In designing the introduction, we law professors should consider two groups of international students: some may be international students whose use of U.S. legal discourse will be temporary, and others may be immigrants who will become permanent members of the American legal discourse community. See Raimes, *supra* note 9, at 414. "[I]nternational instruction is seen as a service 'to prepare students to handle writing assignments in academic courses.'" *Id.* (quoting M. Shih, Content-Based Approaches to Teaching Academic Writing, 20, TESOL Q. 617, 617 (1986)). That is fine if they come here and never write English after they leave. But the purposes in ESL instruction are different for non-native speakers in secondary and college classrooms who are immigrants or refugees. For both, learning legal discourse after learning standard English is akin to learning a third language. See JoAnne Liebman, Contrastive Rhetoric: Students as Ethnographers, 7 J. Basic Writing 6 (1988). So, in a sense, we U.S. law professors must consider legal discourse a new language, probably for both native and non-native speakers.

32. Model Rules of Professional Conduct and Code of Judicial Conduct.

scholarship by contributing one's own thoughts—a concept foreign to some international students, whose scholarship has previously shown their mastery of others' thoughts. The U.S. legal discourse community has also agreed on encouraging service to the community at large, monitoring its members for proper behavior within the community, and establishing uniform guidelines for using and citing the law. These goals, understood and incorporated by the expert, may be unknown to the novice.

Second, the U.S. legal discourse community uses specific *mechanisms of intercommunication* among its members. Those mechanisms include classes, texts, exams, handouts, and e-mail in law school; meetings, memos, correspondence, newsletters, bar association publications, and the Internet in law practice.

Third, members of the discourse community then use these mechanisms for *information and feedback.* We inform each other of developments within the community, of changes in norms, of possibilities for developing areas of expertise, or of new decisions. Lawyers use newsletters and bar journals to get information about substantive changes in the law, amendments to rules of ethics, and lists of disbarred lawyers. We use correspondence to get feedback from clients, law journals for analytical approaches that develop new theories, and *U.S. Law Week* to get information about U.S. Supreme Court decisions. We also assess performance, giving comments to each other on analyses, development, and ability for prognosis. The secondary purpose of these mechanisms is that the profession improves, keeps up to date, moves more steadily toward common goals.

Fourth, in refining its mechanisms to specific *genres,* the U.S. legal discourse community furthers its aims. Memos, letters, briefs, interrogatories, scholarly papers, books, and other genres are used to further such aims as advising clients, resolving disputes, developing legal theories, refining law for practical use, and letting clients know how law affects their activities. The genres themselves function in specifically defined settings; most require thoroughly expressed analysis that exposes each step in the reasoning. These settings vary from trial courts to negotiation sessions to classes to professional publications, each of which has its own audience and purpose. Through these genres, the community "has developed and continues to develop discoursal expectations." Those expectations involve such matters as the form, function, and positioning of discoursal elements; the roles the texts play in the community; and the appropriateness of subject matter.[33] It is in the invention and use of genres that many contrasts emerge. Other legal cultures and discourse communities use their own genres. Some resemble those used by U.S. lawyers, but many do not. The seeming similarities throw novices off.

Fifth, within its mechanisms and genres, the U.S. legal discourse community has developed a specific *lexis,* or lexicon. This lexicon is composed of the technical terminology, or terms of art, that emerge from statutes, cases, and

33. Swales, *supra* note 16, at 26. Swales breaks the concept of *register* into *genre* and *lexis* here, which is useful in defining discourse communities. The legal *register* incorporates both, plus syntax and phraseology.

legal concepts. Those terms become a shorthand for members of the community, each term embodying principles, elements, and applications that are known to those who have studied the law. For U.S. lawyers, such terms as *demurrer, proffer, nuisance, unconscionability,* and *tortfeasor* have specific meanings, some embodying an action, some a doctrine. Similarly, such abbreviations as *FRCP, jnov, M/S/J,* and *UCC* stand for commonly used statutes and motions. The legal *register,* defined more fully below, is the unique combination of terms, phraseology, patterns of discourse, and the syntax and genre conventions developed by the profession from its lexicon.

Finally, the U.S. legal discourse community establishes with several mechanisms its *threshold level of members with a suitable degree of expertise.* We use exams, papers, class participation, and certain acceptable behaviors to establish a threshold level of student members in the academic community; for professors, we use scholarship, teaching, and service to the community. In the legal community at large, we use the bar exam, rules of conduct, publication, and public performance. Together, these mechanisms regulate the profession, keeping within the community those members who have a threshold level of expertise.

These features of legal discourse incorporate traditions that require deference to certain members of the profession; that retain formal language in some settings, informal in others; that assume a knowledge of the U.S. legal culture, both national and local. That information is unknown to international and first-year students alike. We can introduce students to the discourse community by defining its features, such as its mechanisms and its lexicon; by discussing the differences among genres, such as opinions and exams; and by illustrating its expectations and goals in class.

We can show our students more explicitly that embedded within the features of the discourse community are analytical paradigms specific to U.S. legal discourse. Those paradigms are the "logic" or the rhetorical preferences of U.S. scholars and lawyers, nothing more. Both international and U.S. students may better grasp and better use those paradigms if the paradigms are presented in the context of contrastive rhetoric. This study of rhetorical preferences and analytical paradigms may both heighten the student's understanding of the communicative norms within the new discourse community and hasten her acculturation.

B. Rhetorical Preferences and Analytical Paradigms

1. Rhetorical Preferences

The study of rhetorical preferences that vary from culture to culture was initially known as *contrastive rhetoric.*[34] Kaplan, in his ground-breaking article,

34. Kaplan, *supra* note 13, at 14; see also Sara Kurtz Allaei & Ulla Maija Connor, Exploring the Dynamics of Cross-Cultural Collaboration in Writing Classrooms, 10 Writing Instructor 19, 22–23 (1990); Carolyn Matalene, Contrastive Rhetoric: An American Writing Teacher in China, 47 C. Eng. 789, 789–90 (1985).

defined contrastive rhetoric as differences in the sequence of thought between cultures.[35] He noted that these differences explain the phenomenon of students writing well in their native languages but writing poorly in a foreign language, despite mastery of lexicon and syntax. It is the foreign writer's rhetoric and sequence of thought that may in fact "violate the expectations of the native reader."[36] Part of the learning of the target language, he argued, is the mastering of its logical system, which is expressed in the discourse pattern of texts written by native speakers of that language.[37]

Kaplan illustrated his theory by summarizing in very general terms the patterns of some cultures. Japanese speakers, he suggested, circle the subject in written discourse, assuming that the listener will perceive from the implications in the writing what direction the story or analysis is taking.[38] Speakers of Romance languages digress frequently, looping back to the main idea.[39] And Arabic speakers use parallel structures that repeat some previous information while adding new information, a kind of overlapping presentation.[40]

Kaplan was reacting to the original contrastive analysis hypothesis, which had been applied only to grammatical differences across languages, not to rhetorical ones. That is, ESL teachers had used contrastive analysis to adduce which features of the target grammar were difficult; they had then built their pedagogy around the contrasts between the native and the target language. So an ESL teacher would spend more time explaining the proper use of the article to a Russian student than to a French student because articles do not exist in Russian. The original contrastive analysis hypothesis, then, suggested that those elements that are similar to the learner's native language, in grammatical terms, are easier for him to acquire than those elements that are different.[41]

Kaplan's "doodles article," as it came to be called because of the figures he drew representing different rhetorical preferences, added a new dimension to

35. Kaplan, *supra* note 13, at 5; see also Allaei & Connor, *supra* note 34, at 23–24; John Hinds, Contrastive Rhetoric: Japanese and English, 3 TESOL Q. 183 (1983); JoAnne Liebman-Kleine, Toward a Contrastive New Rhetoric—A Rhetoric of Process (Mar. 1986), *microformed on* U.S. Dep't of Educ. Off. of Educ. Res. & Improvement No. ED 271 963 (ERIC).

36. Kaplan, *supra* note 13, at 4.

37. *Id.* at 14.

38. *Id.* at 10; see also Hinds, *supra* note 35; Dennis Ryan, Schema Theory and the Japanese Reader of English (1988), *microformed on* U.S. Dep't of Educ. Off. of Educ. Res. & Improvement No. ED 295 487 (ERIC).

39. Kaplan, *supra* note 13, at 14.

40. *Id.* at 6. But see Zev Bar-Lev, Discourse Theory and "Contrastive Rhetoric," 9 Discourse Processes 235, 237 (1986).

41. Cf. H. Douglas Brown, Principles of Language Learning and Teaching, 2d ed., 154 (Englewood Cliffs, 1987). Later contrastive analysts pointed out, however, that even a language that has a definite article will pattern its use differently from another language with the article.

contrastive analysis by expanding the idea to rhetoric.[42] His article was influential because it seemed to explain the troubles that ESL students were having in composing academic discourse even though their TOEFL scores were high.[43] Recognizing the patterns liberated the writing teacher, who could articulate differences between the student's native thought patterns and the straight line which Kaplan used to illustrate English speakers' thought patterns.[44] The article set in motion several studies on the teaching of writing to ESL students, most of them concentrated on academic discourse at the undergraduate level.[45] Many criticized the oversimplification of Kaplan's characterizations,[46] asserting that it was impossible to generalize in such a way because each person brings to the analysis approaches that go beyond culture, including such factors as family and experience.[47] But most agreed that the concept was useful as a point of departure in analyzing difficulties students encounter in a new discourse.[48] Some researchers discovered that referring to Kaplan's patterns helped students identify overall approaches to problem-solving.[49]

Now the concept of contrastive rhetoric, or cultural *rhetorical preferences* as it is now termed, is accepted only when the appropriate limitations are defined.[50] Writers can view themselves as coming from a particular rhetorical tradition to be retained but not necessarily to be applied wholesale to writing

42. Kaplan actually drew diagrams representing what he observed in a study of about 600 compositions representing three basic language groups. He suggested that Arabic paragraph development was "based on a complex series of parallel constructions" (Kaplan, *supra* note 13, at 6); "Oriental" writing was "marked by what may be called an approach by indirection . . . 'turning and turning in a widening gyre'" (*id.* at 10); Romance languages allowed digression; and Russian consisted of "presumably parallel constructions and a number of subordinate structures" (*id.* at 15).

43. See Richard M. Coe, Toward a Grammar of Passages (Carbondale, 1988); J. R. Martin, Process and Text: Two Aspects of Human Semiosis, *in* 1 Systemic Perspectives on Discourse, eds. James D. Benson & William S. Greaves, 248 (Norwood, N.J., 1985); Maria R. Montaño-Harmon, Discourse Features of Written Mexican Spanish: Current Research in Contrastive Rhetoric and Its Implications, 74 Hispania 417 (1991).

44. See Allaei & Connor, *supra* note 34, at 23–24; Leki, *supra* note 9, at 127. "Researchers since Kaplan's time . . . have made it clear that professional native-speaker English writers do not, in fact, necessarily write in a straight line beginning with a topic sentence and moving directly to support, and so on." *Id.;* see also Hinds, *supra* note 35. Peggy Cheng sees English more like concentric circles emanating from a base theme with importance increasing as the circles get smaller, and with the outer circle being the peroration enclosing the circle. Contrastive Rhetoric: English and Mandarin (1982) (unpublished paper on file with Pennsylvania State University).

45. For discussions on contrastive rhetoric see, e.g., Leki, *supra* note 9, at 133, 136; Matalene, *supra* note 34, at 789; Joy Reid, Responding to ESL Students' Texts: The Myths of Appropriation, 28 TESOL Q. 273, 282 (1994).

46. See, e.g., Swales, *supra* note 16, at 66; Bar-Lev, *supra* note 40; Liebman-Kleine, *supra* note 35.

47. Bar-Lev notes that "there are no doubt rhetorical variations due to many other factors, including register, age, sex, genre, and indeed individual personality and topic of discourse." Bar-Lev, *supra* note 40, at 238.

48. See, e.g., Matalene, *supra* note 34, at 789–90.

49. See, e.g., Liebman-Kleine, *supra* note 35.

50. See Leki, *supra* note 9; see also Ulla Connor et al., Correctness and Clarity in Applying for Overseas Jobs: A Cross-Cultural Analysis of U.S. and Flemish Applications, 15 Text 457 (1995).

in English.[51] Teachers can generalize about a rhetorical tradition but be specific about an individual's writing. Conversely, they are responsible for teaching the expectations of the U.S. audience to ESL writers. But direct lectures alone are not enough: "clear, even profound cognitive awareness of rhetorical strategies does not necessarily translate into the ability to use that knowledge in actual writing situations." Rather, "[c]ontrastive rhetoric studies help us to remember that . . . communicating clearly and convincingly has no reality outside a particular culture and rhetorical context and that our discourse community is only one of many."[52]

The intention of these contrastive rhetoric studies, then, has been not to provide formulas on pedagogic method, but rather "to provide teachers and students with knowledge about how the links between culture and writing are reflected in written products."[53] This reflection represents the current status of the contrastive rhetoric hypothesis: *that writing will reflect varied features of cultural analysis adopted by someone whose own rhetorical preferences emerge.* In a sense, then, we create our own "logics," both culturally and individually.

These "logics" collide in the law classroom. The links among culture, writing, and the nature of personal reflections vary in legal discourse. Even within the U.S. culture, the paradigmatic norms for legal problem-solving may differ from those for academic discourse, narrative, or expository writing. Or, inversely, there may be recognizable similarities between the U.S. legal culture and another country's legal culture, similarities that do not exist between literary, expository, or narrative cultures. These contrasts and comparisons can assist us in defining U.S. legal discourse and analytical paradigms—in defining our cultural logic.

2. Analytical Paradigms

Embedded in "logic" are analytical paradigms, those organizational schemes or particular patterns used within a discourse community to move a listener or reader from one point to another, such as from premise to conclusion in argumentation. In memos, U.S. lawyers often use *deductive* reasoning to move the reader from law to conclusion, or *analogical* reasoning to move the reader from current case law to a conclusion about the client's facts. They may use a *chronological* paradigm to analyze the sequence in which events occurred in determining the outcome of a statute of limitations motion, an *inductive* paradigm to convince a court that several actions resulted cumulatively in violating a client's constitutional rights.

Contrastive studies suggest that we should explain analytical paradigms not in isolation, but in comparison to others. To do so, we can use *schema theory,* which analyzes how paradigms are formed and remembered.

51. See Leki, *supra* note 9, at 138; see also Hinds, *supra* note 35; Raimes, *supra* note 9, at 416.

52. Leki, *supra* note 9, at 138 (discussing Doris Mehan Quick, Audience Awareness and Adaptation Skills of Writers at Four Different Grade Levels (1983) (unpublished D.A. dissertation, State University of New York at Albany)).

53. Raimes, *supra* note 9, at 417 (citing W. Grabe & R. B. Kaplan, Writing in a Second Language: Contrastive Rhetoric, *in* Richness in Writing: Empowering ESL Students, eds. Donna M. Johnson & David H. Roen, 271 (New York, 1989) [hereinafter Johnson & Roen]).

Schema theory suggests that we remember new information by comparing it to old, familiar information that is stored in patterns, or *schemata,* in our brains. If we are aware of the schemata, we can welcome new schemata and information more readily.[54] In other words, text itself does not carry meaning; rather, "a text only provides directions for listeners or readers as to how they should retrieve or construct meaning from their own previously acquired knowledge."[55] This background knowledge provides the basis for the reader's interpretation of a text and most certainly for that reader's recreation of a text in the target discourse. This interpretation "is guided by the principle that every input is mapped against some existing schema and that all aspects of that schema must be compatible with the input information."[56] Schemata are hierarchically organized from most general at the top to most specific at the bottom.

Initially, schemata were conceived of to "explain how the information carried in stories is rearranged in the memories of readers or listeners to fit in with their expectations."[57] In both L1 and L2 contexts, "human beings consistently overlay schemata on events to align those events with previously established patterns of experience, knowledge and belief."[58] Previous experience and prior texts allow us to recognize genres,[59] but when there is neither, the difficulty of entering a new discourse community increases.

54. For this combined standard, against which all subsequent changes of posture are measured before they enter consciousness, we propose the word "schema." By means of perpetual alterations and position we are always building up a postural model of ourselves which constantly changes. Every new posture of movement is recorded on this plastic schema, and the activity of the cortex brings every fresh group of sensations evoked by altered posture into relation with it. Immediate postural recognition follows as soon as the relation is complete.

Frederic C. Bartlett, Remembering 199–200 (New York, 1932) (citing Sir Henry Head, Studies in Neurology 605–06 (London, 1920)). "'Schema' refers to an active organisation of past reactions, or of past experiences, which must always be supposed to be operating in any well-adapted organic response." *Id.* at 201. Bartlett's work continues to offer insight into the way we learn.

55. Patricia L. Carrell & Joan C. Eisterhold, Schema Theory and ESL Reading Pedagogy, *in* Methodology in TESOL: A Book of Readings, eds. Michael H. Long & Jack C. Richards, 218, 220 (New York, 1987).

56. *Id.* at 220–21.

57. Swales, *supra* note 16, at 83 (citing Bartlett, *supra* note 54); see also David Piper, Contrastive Rhetoric and Reading in a Second Language: Theoretical Perspectives on Classroom Practice, 42 Can. Mod. Language Rev. 34, 35 (1985) (quoting Bartlett, *supra* note 54, at 201):

> *Schema* is "the active organization of past reactions or of past experience." The thrust of Bartlett's research, indeed, was to demonstrate, first, that individuals typically *construct* and *reconstruct* given information in memory and, second, that they are likely in the course of these constructive processes to normalize their interpretations in ways which bring them in line with their own cultural experience.

Piper also notes that a number of studies "have all demonstrated the strong effects of first-cultural schemata in reading comprehension and memory for narratives from a foreign literary heritage." *Id.* at 36.

58. Swales, *supra* note 16, at 83 (citing A. J. Sanford & Simon C. Garrod, Understanding Written Language (Chichester, 1981)); see also Interactive Approaches to Second Language Reading, eds. Patricia Carrell et al. (Cambridge, Mass., 1988)).

59. Swales, *supra* note 16, at 83.

The novice international student may be tempted, then, to import the analytical paradigms or schemata from his legal culture into U.S. legal discourse. He has neither prior experience nor experience with prior texts. Both his prior experience and the texts he has read were rooted in another legal culture; he may naturally assume that experience and texts within this legal culture must be similar. Similarly, the novice U.S. student may import sociology schemata—or political science or business schemata—into U.S. legal genres. We can assist all uninitiated students by identifying thought sequences and choosing texts that allow for gradual assimilation of new information. A student's ability to interpret accurately should then increase.

Schema theory suggests that there are two basic modes of interpretation: *bottom-up processing* and *top-down processing*. Bottom-up processing is evoked by the incoming data, which drive the reader up toward the more general information; bottom-up processing is often called data-driven. Top-down processing is conceptually driven because it "occurs as the system makes general predictions based on higher level, general schemata and then searches the input for information to fit into these partially satisfied, higher order schemata." Both levels should be occurring simultaneously as a reader interprets. That is, the data needed to fill out the schemata become available through bottom-up processing, while top-down processing "facilitates their assimilation *if they are anticipated by or consistent with the listener/reader's conceptual expectations.*" Bottom-up processing ensures that the reader will be sensitive to information that is novel or that does not fit ongoing hypotheses about the content or structure of the text; top-down processing helps the reader resolve ambiguities or select between alternative possible interpretations of the incoming data.[60]

In the U.S. law classroom, bottom-up processing occurs when students gather data from one case at a time; top-down processing may come from general discussions about legal theory or suggestions of general hypotheses. Reading several cases that interpret a UCC provision gives the student data about specific conclusions on specific facts; discussions may reveal not only the general rule being interpreted but also the rules of interpretation used by courts that apply UCC law. Both are happening simultaneously. But this information, particularly the theory, may differ from the student's expectations or experience. If the difference is too great, the student will have difficulty assimilating the information.

Beyond the modes of processing schemata, the schemata themselves break into two groups: *formal schemata* and *content schemata*. Formal schemata assume background knowledge of different types of texts or genres, such as narratives,

60. Carrell & Eisterhold, *supra* note 55, at 221 (emphasis added).

newspaper articles, memos, briefs, or opinion letters.[61] Content schemata assume background knowledge about the content area of a text, such as the economy of Switzerland, Mardi Gras in New Orleans, the First Amendment, or a United Nations treaty.[62] So "when content and form are familiar the texts will be relatively accessible, whereas when neither content nor form is familiar the text will be relatively inaccessible."[63] In other words, comprehension or a faltering interpretation results when the communicator has failed to provide sufficient clues to invoke either or both of these schemata, or when the listener or reader does not possess the appropriate schemata. Most importantly for the international student, "[o]ne of the most obvious reasons why a particular content schema may fail to exist for a reader is that the schema is culturally specific and is not part of a particular reader's cultural background."[64] Of course, content schemata in U.S. law are usually new to the international student, whose comprehension depends crucially on his being able to relate information from a text to already existing background knowledge.[65] The same is true for novice U.S. students. So we must make that relation possible.

61. Within expository writing, "Meyer and her colleagues . . . recognize five different types of expository rhetorical organization: *collection*—list, *causation*—cause and effect, *response*—problem and solution, *comparison*—comparison and contrast, and *description*—attribution." *Id.* at 223 (citing Bonnie J. F. Meyer, The Organization of Prose and Its Effects on Memory (Amsterdam, 1975); Bonnie J. F. Meyer, The Structure of Prose: Effects on Learning and Memory and Implications for Educational Practice, *in* Schooling and the Acquisition of Knowledge, eds. Richard C. Anderson et al., 179 (Hillsdale, 1977); Bonnie J. F. Meyer, Basic Research on Prose Comprehension: A Critical view, *in* Comprehension and the Competent Reader: Inter-Specialty Perspectives, eds. Dennis F. Fisher & Charles W. Peters, 8 (New York, 1981); Bonnie J. F. Meyer & G. Elizabeth Rice, The Interaction of Reader Strategies and the Organization of Text, 2 Text 155 (1982)).

62. Carrell & Eisterhold, *supra* note 55, at 221.

63. Swales, *supra* note 16, at 87 (discussing Patricia L. Carrell, Content and Formal Schemata in International Reading, 21 TESOL Q. 461 (1987)).

64. Carrell & Eisterhold, *supra* note 55, at 223. "[T]he implicit cultural content knowledge presupposed by a text interacts with the reader's own cultural background knowledge of content to make texts whose content is based on one's own culture easier to read and understand than syntactically and rhetorically equivalent texts based on a less familiar, more distant culture." *Id.* (citing Margaret S. Steffenson et al., A Cross-Cultural Perspective on Reading Comprehension, 15 Reading Res. Q. 1:10 (1979); Patricia Johnson, Effects on Reading Comprehension of Language Complexity and Cultural Background of a Text, 15 TESOL Q. 2:169 (1981); Patricia L. Carrell, The Role of Schemata in L2 Comprehension (paper presented at 15th Annual TESOL convention (1981)).

65. See Carrell & Eisterhold, *supra* note 55, at 224; see also V. K. Bhatia, Language of the Law, 20 Language Teaching 227, 230 (1987):

> Almost all the legal cases and judgements available to date, and there are millions of them, consistently display a typical discourse organisation which is unique to this genre. . . . Almost all cases begin with a description of the facts of the case, followed by the argument of the judge writing the judgement, which may include a discussion of earlier relevant cases having a bearing on the one being considered, and the rules of law, if any, applicable to the case. Then comes what might be called the principle of law which is deductible from the case description and the argument of the judge. This principle of law in legal terminology is known as the *'ratio decidendi'* of the case, and this is normally laid down by the judge for application to other cases of similar or overlapping case descriptions. And then, finally, comes the decision of the judge.

For example, consider again—this time, using the terminology of schema theory—the text described earlier:

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If the consumer disagrees with the information in
the report, the agency must investigate again.
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The reader will try to relate this passage to something familiar, some schema that will account for this event. Many schemata are possible, but perhaps the most common one will involve, as described earlier, a consumer receiving a report about a purchase and disagreeing with the description of events. Now we see the related bits of information as forming part of this schema: there has been a purchase, there was some trouble about the purchase, the consumer filed a report with an agency, and the agency has already investigated the matter once. The schema has to include knowledge of federalism: an agency is a governmental body that is an extension of the executive branch of government, and the consumer has certain rights that are protected by laws and regulations invoked by the agency. If we add new information that the consumer is a radio station and the agency is the FCC, the schema adjusts because there may be reporting requirements for the radio station. The new information embedded in

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. . . before it turns over the matter to a criminal
court
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requires us to adjust our schema itself to include the possibility of fraud or white-collar crime. To interpret and assimilate this information, the novice student needs to have in place content schemata that include an understanding of where agencies fit into the authority hierarchy, how consumer law has developed in the United States, how criminal law can also apply. If the content schema resembles the schema of his native discourse community, the acculturation and facility with creating and using analytical paradigms will be more rapid.[66]

When it does not, the international student will have some difficulty, even with repetition. When applied to international students, schema theory suggests that if the novice cannot follow a text, he cannot reproduce it or create new problem-solving strategies using that schema.[67] If an expository English

66. Schemata, the rhetorical organizations of texts, take on particular meaning, then, for the international student. The sooner she can recognize and remember the organization and problem-solving sequences in the U.S. legal discourse community, the sooner she can reproduce them. Some recognition may come from similarities to her own legal culture; from that, she can build new information in a bottom-up processing sequence. Some generalizations may also be similar, from which she can use top-down processing to assimilate new information. This sometimes makes acculturation into the U.S. legal discourse community more rapid than acculturation to some academic or professional communities, for example. That is, U.S. schemata for interpreting statutes may resemble an international student's native schemata more than narrative schemata in the two cultures. As expected, some of the hardest interpretation may come from the areas that seem similar but are actually applied differently.

67. According to schema theory, successful readers sample a text in an interactive process, using information already organized in their heads to predict what is coming next in the text. They then combine the new information with that which they already know to comprehend what they read in a text. Thus, if readers cannot follow the arrangement of ideas in a text, they cannot successfully predict or hypothesize ideas in order to make the connections necessary to comprehend a reading. Montaño-Harmon, *supra* note 43, at 424.

paragraph, or an analytical paradigm used in U.S. legal discourse, "follows a sequence that is predominantly linear in its development, using an inductive or deductive pattern, and that discourse pattern in other languages may be different," then the international student typically imports first-cultural schemata in reading comprehension and memory for foreign texts.[68] To compensate for this natural tendency, we can identify the features of our own analytical paradigms and, if possible, contrast those paradigms to the student's.[69]

In the U.S. legal discourse community, analytical paradigms are often implicitly, not explicitly, defined. Further, all these paradigms assume certain cultural preferences and innate features of the discourse community. U.S. lawyers often prefer moving from general information to specific information, that is, from the legal principle or rule through analogical reasoning to a conclusion about how the rule applies to specific facts. This deductive approach, mixed with analogical thinking, dominates most memos and briefs. Other analytical paradigms are borrowed from expository writing, though they are used less often. For example, we use *definition* in assessing the plain meaning of statutes and building an analysis around that principle of statutory construction; we use *illustration* to argue examples from persuasive jurisdictions; and *enumeration* clarifies a statutory analysis by listing its elements.[70] Within the legal culture, not only forms of analytical paradigms but also traditions of their usage are subsumed in interpreting and using them. For example, traditional statutory interpretation strategies have evolved beyond the canons of construction,[71] as have traditional principles of stare decisis reasoning.[72] The concept of policy considerations, strongly rooted in U.S. culture but foreign to the novice, also affects analytical paradigms.

In using these paradigms, all members of the U.S. legal discourse community assume that authority will be cited according to the relationships dictated by federalism. That is, they expect that the writer understands what authority is predominant, how the sources of authority are linked, and what weight to give to each in coming to a conclusion. The answers to those questions help the writer design a specific analytical paradigm for each legal problem. Further, the members of the community assume certain things about the content of the document: that all relevant authority will be included and that omitting any is a violation of the code of ethics; that all irreievant authority will be

68. *Id.* at 417.

69. See Allaei & Connor, *supra* note 34; Ardiss Mackie & Chris Bullock, Discourse Matrix: A Practical Tool for ESL Writing Teachers, 8 TESL Can. J. 67 (1990).

70. For more examples of expository writing paradigms, see Louis A. Arena, Linguistics and Composition: A Method to Improve Expository Writing Skills (Washington, 1975); Thomas S. Kane, The New Oxford Guide to Writing (New York, 1988).

71. Cf. Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947); William N. Eskridge, Jr., Dynamic Statutory Interpretation (Cambridge, Mass., 1994); William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. Pitt. L. Rev. 691 (1987); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990).

72. See Mark Tushnet, The Degradation of Constitutional Discourse, 81 Geo. L.J. 251 (1992); Williams, *supra* note 26.

excluded; that legal holdings will be stated explicitly when relevant to advancing the analysis; that legally significant facts will be explained in detail when they resemble the facts being analyzed; and that authority will be cited according to a uniform system accepted by the readers involved. All these assumptions build our cultural "logic"; all might be assimilated more effectively if made explicit to both international and U.S. novices.

Other assumptions become more complicated for the novice. While the U.S. legal community still uses Aristotelian principles of deductive and inductive reasoning as adapted to federalism, it has gradually embraced other notions of analysis, including deconstruction[73] and anecdote.[74] The community itself is in controversy over the value of these methods of analysis, or whether or not they can even be called analytical paradigms.[75] As the community incorporates new theories, new paradigms, and new analytical tools, the novice's work increases. And quite often, in the U.S. law classroom, we assume that the novice has done this work or can infer paradigms and assumptions from the discussions. Some novices can, but we can hasten the acculturation process if we make some of these analytical processes and paradigms more explicit in rhetorical terms.

If logic is *a* mode of reasoning, not *the* mode of reasoning,[76] then in law, logic is the schema each legal culture chooses to move the reader from point A to point Z. Logic is the culture's rhetorical preferences, invented within the culture, refined within local practices. These rhetorical preferences incorporate the relationships among writer, subject matter, purpose, and audience. They are, in fact, "the verbal equivalent of ecology, the study of the relationships that exist between an organism and its environment. Both rhetoric and ecology are disciplines that emphasize the inescapable and, to a great extent, decisive influence of local conditions."[77] Those local conditions vary within the discourse and manifest themselves in analytical paradigms. We must

73. See generally Tushnet, *supra* note 72; Pierre Schlag, "Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction, 11 Cardozo L. Rev. 1631 (1990); Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741 (1994).

74. Authors use anecdotes to set the law situationally—a method that sets the law in cultural relief and promotes cross-cultural discussion. See, e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987); Charles R. Lawrence III, Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment, 37 Vill. L. Rev. 787 (1992); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989).

75. See generally Jane B. Baron, Resistance to Stories, 67 S. Cal. L. Rev. 255 (1994); Robin West, Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory, 60 N.Y.U. L. Rev. 145 (1985); Alex M. Johnson, Jr., Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship, 79 Iowa L. Rev. 803 (1994); Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807 (1993).

76. Compare "logic," defined as "a mode of reasoning," with "Logos," defined as "cosmic reason, affirmed in ancient Greek philosophy as the source of world order and intelligibility." The American Heritage Dictionary, 2d ed., 767 (New York, 1985). Our culture-centric tendencies may pull us to the latter, rather than the former.

77. Matalene, *supra* note 34, at 789.

articulate, evoke, and even create analytical paradigms that are accessible to the international and the U.S. student. Once we have done so, we are better prepared to explain the specific features of *register* and *genre* within the discourse community.

C. Register

Our "logic" also manifests itself through the legal register. The term *register* refers to a discourse community's use of the language and instruments of communication themselves. Register incorporates the lexicon, or specialized terms created by the community; the syntactical patterns; the phraseology; and the genres, or instruments, used by the community. Register can also be described as the functional variety of a language, or "a contextual category correlating groupings of linguistic features with recurrent situational features."[78] We articulate logic by manipulating register.

Studies in register have typically examined such things as the verb forms in scientific English;[79] sentence length, voice, and vocabulary;[80] and genre[81] in a target language. The purpose of the early studies was to provide "a descriptively-adequate account of distributional frequencies in the target language variety and thus offer a basis for prioritizing teaching items in specialized ESL materials."[82] These studies preceded contrastive rhetoric studies and emphasized the lexical features of the target language and its use of syntax and specialized forms as ends in themselves.

The study of register in target communities then evolved to "show how differentiating influences such as changing communicative purpose can operate within a single spoken or written discourse of a particular type," such as between sections of research articles or paragraphs of newspaper articles.[83]

78. Swales, *supra* note 16, at 40 (citing Michael Gregory & S. Carroll, Language and Situation: Language Varieties and Their Social Contexts 4 (London, 1978)). Swales refines the definition as follows:

> This category has typically been analyzed in terms of three variables labeled field, tenor and mode. Field indicates the type of activity in which the discourse operated, its content, ideas and "institutional focus." Tenor handles the status and role relationships of the participants, while mode is concerned with the channel of communication (prototypically speech or writing). "The field, tenor and mode act collectively as determinants of the text through their specification of the register; at the same time they are systematically associated with the linguistic system through the functional components of the semantics." Thus, field is associated with the management of the ideas, tenor with the management of personal relations, and mode with the management of discourse itself.

Id. (citing James D. Benson & William S. Greaves, Field of Discourse: Theory and Application, 1 Applied Linguistics 45–55 (1981), and quoting M. A. K. Halliday et al., The Linguistic Sciences and Language Teaching 122 (London, 1964)).

79. *Id.* at 2 (citing Rodney D. Huddleston, The Sentence in Written English: A Syntactic Study Based on an Analysis of Scientific Texts (Cambridge, England, 1971)).

80. See, e.g., Peter Goodrich, The Role of Linguistics in Legal Analysis, 47 Mod. L. Rev. 523, 530–31 (1984); McDaniel, *supra* note 9.

81. See, e.g., Swales, *supra* note 16.

82. *Id.* at 2.

83. *Id.* at 3.

Thus the rhetorical questions of purpose and audience were seen to affect the communicator's choice of vocabulary, syntax, or form. For example, scientists use technical terms to summarize results for knowledgeable colleagues, doctors use medical shorthand and charts to communicate with other doctors who may treat the same patient, and sports announcers use abbreviated terms and elliptical syntax in announcing events in action.

1. The Traditional Legal Register

The U.S. legal register encompasses both traditional and modern language. The traditional aspect of the register is the one most frequently caricatured; it is marked by doublets, repetition, Latinisms, and nominalizations.[84] It also contains discourse markers that are a shorthand for legal writers.[85] For example, "whether" precedes the formal issue statement. The actor and the person acted upon are referred to by the traditional "-or" and "-ee" signals, as in *offeror* and *offeree, lessor* and *lessee.* Notary notices accompany many documents, and some jurisdictions still require boilerplate language to introduce certain documents, such as complaints or notices, or to outline certain contract provisions.

This traditional legal register, often referred to as turgid and impenetrable,[86] is a form of fossilized English, where terms used traditionally for a precise purpose are frozen, or fossilized, and remain in use despite natural evolution of the language.[87] It manifests itself in formal introductions, long and complex sentences, long paragraphs, Latinate words, and complex conditional verb tenses.[88] It is most evident in judicial opinions, real estate documents, wills, contracts, statutory drafting, and some scholarly writing. The traditional register is also associated with certain extinct genres such as demurrers and bills of lading.[89] The novice, international or not, may take

84. Brenda Danet, Language in the Legal Process, 14 Law & Soc'y Rev. 444 (1980).

85. See Deborah Schiffrin, Discourse Markers (Cambridge, Mass., 1987).

86. See, e.g., Robert A. Chaim, A Model for the Analysis of the Language of Lawyers, 33 J. Legal Educ. 120 (1983); Goodrich, *supra* note 80; Judith N. Levi, The Study of Language in the Judicial Process, *in* Language in the Judicial Process, eds. Judith N. Levi & Anne Graffam Walker, 3 (New York, 1990); Richard Hyland, A Defense of Legal Writing, 134 U. Pa. L. Rev. 599 (1986).

87. *Fossilization* is a term used in language acquisition teaching to refer to non-English patterns that non-native speakers use repeatedly and hold on to even after they have achieved a more sophisticated understanding and usage of the language. For example, the French use of *the* in *I would like the tea* or the Norwegian pronunciation of *January* as *Yanuary* are fossilizations. See Brown, supra note 41.

88. See Bhatia, *supra* note 65, at 227 (the term "'language of the law" encompasses several usefully distinguishable genres, which are "reflected in the lexico-grammatical, semantico-pragmatic, and discoursal resources that are typically and conventionally employed to achieve successful communication in various legal settings").

89. *Writ of attainder, conditional fee,* and *trover* are three such obsolete legal terms. In general, the writ system was repudiated by the Federal Rules of Civil Procedure, which provide for "one form of action known as a civil action." Fed. R. Civ. P. 2. How would an international student know where to look? How similar will this be to her legal culture's history?

the traditional register as the lawyers' secret language and may begin to imitate it.[90]

There is a reason why fossilized language persists in the legal discourse community. Language is attached to, becomes, the law. Once "set" as a definition or a term that embodies a doctrine, a word or phrase becomes a *term of art*[91] and will only stubbornly give way to new terms. This is probably more true in law than in some other disciplines, where invention easily overrides previous work and the terminology that accompanied it. Lawyers are more likely to hang on to language to fulfill their broadly defined goal of predictability than are, say, scientists who discover a new explanation for a phenomenon.

Nevertheless, lawyers seem to have held on to this language for too long. Under continuous criticism, particularly from the consumers of legal language,[92] the traditional register is giving way to a modern one. What this means for the legal writer is that she must not only interpret the community's register, but also translate it into modern language.

2. The Modern American Legal Register

The current legal reader, expert or novice, lawyer or nonlawyer, now expects the writer to translate traditional language to contemporary prose—with active verbs, concise terms, and trimmed sentences. This translation has evolved into the Modern American Legal Register.[93] MALR crosses genres, appearing in consumer documents, letters, briefs, and even some contracts. It incorporates traditional legal language,[94] but also includes features that represent its increasingly diverse users. Its differences lie in the way its discourse structure reflects the current meaning of rhetorical features, such as purpose, audience, and scope; the way it arranges analytical paradigms within genres; the way it matches syntax to legal substance; and the way it uses lexicon. While its features are numerous, the following characteristics suggest its general framework:

- context-independent texts, with definitions, authorities, relevant excerpts of documents included in the text

90. See Williams, *supra* note 26, at 24–29. Williams defines presocialized, socialized, and postsocialized writers. These three stages represent the gradual acculturation of novices into the discourse community. The presocialized writer is unfamiliar with legal terms and may use them incorrectly; the socialized writer uses traditional language and may exclude nonlawyers; the postsocialized writer accurately translates legal terms back to plain English.

91. See Mary Barnard Ray & Jill J. Ramsfield, Legal Writing: Getting It Right and Getting It Written, 2d ed., 308 (St. Paul, 1993).

92. See, e.g., Danet, *supra* note 84, at 451.

93. I am coining this term to identify our register, using "Modern" to mean contemporary, nothing philosophical, and "American" to mean "of or pertaining to the United States." CUSLR, or Contemporary United States Legal Register, seems awkward, and CALR is already taken (Computer Assisted Legal Research).

94. This is one of the phenomena that define a discourse community: the ability to absorb new genres, terms, and approaches. Once these borrowings are assimilated, the community's features themselves are of course redefined. This is exactly what has happened in the last 20 years in the U.S. legal discourse community, largely because of consumers' demands that their documents be readable.

- fronting, or putting the most important information first, such as remedy sought, brief answer, or the answer to the client's question
- one general idea per paragraph, with emphasis on short paragraphs
- simpler syntax, with roughly one thought per sentence
- strong topic sentences, related to message and headings
- variety in sentence length and structure, with more liberal use of short sentences
- more extensive use of paraphrase, fewer floating quotations
- concrete rather than abstract words
- preference for active verbs over descriptive, abstract, or passive
- close proximity of subject and verb
- consistent use of terms of art
- deliberate use of rhetorical devices, such as antithesis or periodic structure
- headings, with verbs, to guide the reader
- deliberate and frequent use of cohesive devices to guide the reader
- use of citations for conciseness
- use of graphics to clarify points
- fewer nominalizations
- few prepositional phrases
- minimal use of footnotes, if any

Further, within MALR are discourse markers that have become a more accessible shorthand than those used in the traditional register. MALR's signals include use of bullets or boxes to signal lists or outline comparative analyses; use of a direct question with a question mark in framing issue statements; and use of the second person in writing to clients.

The following text is in the traditional legal register:

> In the event of default in the payment of this or any other Obligation or the performance or observance of any term or covenant contained herein or in any note or other contract or agreement evidencing or relating to any Obligation or any Collateral on the Borrower's part to be performed or observed, or the undersigned Borrower shall die; or any of the undersigned become insolvent or make an assignment for the benefit of creditors; or a petition shall be filed by or against any of the undersigned under any provision of the Bankruptcy Act; or any money, securities or property of the undersigned now or hereafter on deposit with or in the possession or under the control of the bank shall be attached or become subject to distraint proceedings or any order or process of any court,

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or the Bank shall deem itself to be insecure,
then . . . .
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Here is the same statement in MALR:

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Default. I'll be in default:

1. If I don't pay an installment on time; or

2. If any other creditor tries by legal process to
take any money of mine in your possession.[95]
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By describing and defining features of the register, by noting specific discourse markers, by regularly translating from the traditional register to the modern one, we demystify legal language for novices and encourage more intentional and precise spoken and written translation of the register.

3. U.S. Legal Genres

As a subset of register, *genre* refers to the register's range of manifestations. Genres are the types of communicative events, such as briefs, memos, opinion letters, or judicial opinions. Genres are realized through registers, and registers in turn are realized through language.[96] Thus genre is a system underlying register. Genres constrain the ways in which register variables of field, tenor, and mode can be combined in a particular discourse community. Genres also help analyze discourse schemata, or analytical paradigms, because they have a beginning, middle, and end. In Swales's words, "genres . . . are completable structured texts . . . while registers . . . represent more generalizable stylistic choices."[97] Swales continues: "[T]he nature of genres is that they coalesce *what* is sayable with *when* and *how* it is sayable."[98]

Genres vary among legal cultures, even if their names are the same. A brief in a Swedish court of appeals is about ten pages long; a brief in a Michigan court of appeals may be fifty pages long.[99] An international student, then, should benefit from a clear understanding of the way genres constrain the combination of variables in the legal register.

In the U.S. law classroom, we primarily use two genres, the judicial opinion and the exam. In clinical courses, seminars, and legal writing courses, we introduce such other genres as motions, interrogatories, pleadings, intraoffice memos, appellate briefs, and client letters. Once the novice understands the features of a specific genre, she can better develop her analytical paradigm to suit it. We can hasten her understanding if we clearly define genre as we introduce it.

95. Scott J. Burnham, Drafting Contracts 272 (1993).

96. Swales, *supra* note 16, at 40 (referring to Martin, *supra* note 43, at 248–74).

97. *Id.* at 41 (citing Functional Approaches to Writing: Research Perspectives, ed. Barbara Couture (London, 1986)).

98. *Id.* at 88.

99. See Kirstin M. Frederickson, Contrasting Genre Systems: Court Documents from the United States and Sweden, 15 Multilingua 3, at 275, 284 (1996). The author suggests that register varies according to genre. This is certainly the case with the traditional legal register, but MALR should penetrate all documents, according to the requests of modern legal readers.

Swales provides a working definition of genre that uses the following criteria.

1. A genre is a class of communicative events, which comprise "not only the discourse itself and its participants, but also the role of that discourse and the environment of its production and reception, including its historical and cultural associations."[100] The U.S. legal discourse community manifests itself in its genres. For example, the judicial opinion is a direct product of the common law system; its history and culture embody the traditions of judge-made law. Client letters, to meet ethical standards, should contain enough information so that the client can make his own decision about how to proceed. Motions follow rules of civil procedure, and interrogatories include questions that honor the discovery rules' requirements that information be exchanged before a trial. Each genre reflects the discourse, participants, and historical and cultural associations. The traditional register particularly manifests itself in genres whose history requires specific language, such as contracts.

2. The principal feature that turns a collection of communicative events into a genre is some shared set of communicative purposes. Those purposes might be specific, as in the genres of recipes or new stories, or quite complex, as in the case of poetry.[101] In the law, this shared set of communicative purposes is specifically defined. It includes informing, as in memos; persuading, as in briefs; assuaging, as in letters; denying, as in responses; and encouraging, as in advice letters. These purposes, complex and rarely singular, are culturally specific and need defining if the novice is to grasp the direction of the genre.[102]

3. Exemplars or instances of genres vary in their prototypicality. The elements that define prototypicality might be communicative purpose, but also form, structure, and audience expectations.[103] Thus an in-house memo may require the same elements from firm to firm, but be arranged differently for different audiences or purposes. A brief written to a trial court is less formal than an appellate brief. And formal requirements for notice, pleading, and motions will vary from county to county within a state.

4. The rationale behind a genre establishes constraints on allowable contributions in terms of their content, positioning, and form.

> Established members of discourse communities employ genres to realize communicatively the goals of their communities. The shared set of purposes of a genre are thus recognized—at some level of consciousness—by the established members of the parent discourse community; they may be only partly recognized by apprentice members; and they may be either recognized or unrecognized by non-members.[104]

100. Swales, *supra* note 16, at 45–46.

101. *Id.* at 46–49.

102. See Ray & Ramsfield, *supra* note 91, at 242.

103. Swales, *supra* note 16, at 49–52.

104. *Id.* at 52–53.

Recognizing these shared purposes is key to acculturating effectively. Novices also need to know the conventions. "The conventions, of course, are constantly evolving and indeed can be directly challenged, but they nonetheless continue to exert influence."[105] Novices, then, may find certain genres restrictive, overly formal, even stultifying. They may feel that legal writing has no creative aspects because the genres require such specific information and even a prescribed order for the information. A contract may contain boilerplate sections both at the beginning and at the end; a law firm may further restrict the contract by creating its own conventions for certain contracts. The law itself further constrains the genre by requiring specific information to be included so that the contract, for example, complies with the state's contract laws.[106]

5. A discourse community's nomenclature for genres is an important source of insight. Those who routinely use the genre, or its active members, "give genre names to classes of communicative events that they recognize as providing recurring rhetorical action."[107] *Arbitration conferences,* a form of spoken genre, indicate the purpose of the communicative event and the rhetorical action, as do *respondent's brief, contract, motion,* and *filing.* Active members generate genre categories, as well, such as *Lexis search, key number search, client counseling,* or *book review.*

Swales notes that genres differ greatly in rhetorical purpose and in the extent to which their producers are conventionally expected to consider their anticipated audience.[108] This concept relates specifically to the process-oriented approach to writing and to the social view. If the writer must anticipate his audience, he must incorporate into his process a kind of second-guessing of both the reader's "general state of background knowledge and . . .

105. *Id.* at 53.

106. "The point to note here is that even when we grant that surface features and local decisions are highly contributory to the performance outcome, it is still very much the case that for a participant to have a sense of the 'underlying logic' or rationale is facilitative in both reception and production." *Id.* at 54.

107. Swales then suggests the following definition:

> A genre comprises a class of communicative events, the members of this share some set of communicative purposes. These purposes are recognized by the expert members of the parent discourse community, and thereby constitute the rationale for the genre. This rationale shapes the schematic structure of the discourse and influences and constrains choice of content and style. Communicative purpose is both a privileged criterion and one that operates to keep the scope of a genre as here conceived narrowly focused on comparable rhetorical action. In addition to purpose, exemplars of a genre exhibit various patterns of similarity in terms of structure, style, content and intended audience. If all high probability expectations are realized, the exemplar will be viewed as prototypical by the parent discourse community. The genre names inherited and produced by discourse communities and imported by others constitute valuable ethnographic communication, but typically need further validation.

Id. at 58.

108. *Id.* at 62.

potential immediate processing problems."[109] There is a "reciprocity of semantic effort to be engaged in by both sides; a contract binding writer and reader together in reaction and counter-reaction."[110] But this contract, under the social view, is subject to fluctuations among local audiences and puts constraints on the writer's decision-making process. The expert learns to shift quickly for these fluctuations; the novice moves more slowly and may produce writer-based prose. More interestingly, the expert may produce writer-based prose in a new genre.[111]

For novices, the concept of genre is even more complicated. Within each genre lie analytical paradigms that are not only unique to the genre, such as deductive reasoning in a brief, but are also specific to the U.S. legal culture. Other discourse communities have developed different rhetorical preferences, which may cause novices to have certain rhetorical gaps. Once we explain register and genre, we can use contrastive techniques to close those gaps.

A genre in the U.S. legal discourse community invokes particular rhetorical expectations, paradigms, forms, and traditions. A memo, for example, requires the writer to redefine the fundamental concept of modern rhetoric—audience.[112] The term takes on multiple meanings. First, in the United States, the memo's audience may include lawyers and nonlawyers, experts and novices; a Swiss lawyer will rarely send a memo to a nonlawyer or nonexpert. Second, the stakes are usually quite high for whatever audience is reading: winning a judgment, settling a case, risking being reversed. With such high stakes, the U.S. legal audience is unlikely to give the writer the benefit of the doubt, even if he is a fellow lawyer. He can make too many mistakes in finding and interpreting the law. In other words, the U.S. legal audience reads in bad faith; a Japanese lawyer may trust his colleague more because they share a knowledge of the complete body of Japanese law. These considerations affect the genre, whose scope may include more information, more citations, or more explicitly stated steps in the reasoning.

Further, U.S. legal genres use paradigms dictated by the intricate relationships created in a federalist system, a system new to many international students. U.S. legal readers expect the analytical paradigm used within a genre to be authority-driven, proceeding according to the cultural traditions of statutory and case interpretation developed in the United States. Using cases is optional in many cultures; "briefing" the judge means presenting authority only for your client; and code interpretation relies exclusively on plain meaning in some legal cultures. While some U.S. paradigms may be similar to those used in other cultures, they will bear idiosyncrasies of U.S.

109. *Id.* Swales quotes H. G. Widdowson: "As I write, I make judgements about the reader's possible reactions, anticipate any difficulties that I think he might have in understanding and following my directions, conduct, in short, covert dialogue with my supposed interlocutor." *Id.* (quoting Explorations in Applied Linguistics 176 (New York, 1979)).

110. *Id.* at 62–63.

111. *Id.* at 64.

112. For discussion of modern rhetoric see, e.g., Leki, *supra* note 9, at 133, 136; Matalene, *supra* note 34, at 789; Reid, *supra* note 45, at 282.

usage. Forms and traditions are peculiar to U.S. legal genres, as well. Just as one should not send white flowers in Indonesia or give the OK hand signal in Brazil, so a novice should not file anything with typographical errors or omit cites for all authority. Knowing how genres work will hasten the novice's reading comprehension and analytical ability.

We can frame our legal community as one that engages in a specific discourse. We can define that discourse by being explicit about its rhetorical preferences. We can teach the traditional register as the foreign language that it is for international and U.S. students alike, and we can identify how that register translates to MALR and to specific genres. By being more explicit and specific, we may reward not only our students but also ourselves as we see them perform better in the new discourse community and acculturate more quickly to it. Contrastive approaches offer us a richer teaching repertoire as our classes become more international.

II. Cross-Cultural Rhetorical Preferences in the Law Classroom

Globalization is affecting the way we think as lawyers and problem-solvers. To create an effective classroom environment, we have to acknowledge the inevitable shrinking of the international legal community. International students are our closest links. But they pose some interesting challenges: they are not native speakers of English, they may or may not have practiced extensively in their own systems, and they often have little or no experience in the U.S. legal discourse community. They bring varied approaches and assumptions about legal analysis.[113] A student who has excelled in memorizing Swiss Code provisions will be frustrated by having to use so many cases; an Italian student, who has the option to take or leave cases in her system, will eliminate U.S. cases she doesn't like; and a student from Ghana whose system is common-law-based will be puzzled by the synthesis of cases that is peculiarly American. Their "logic" is not ours.

Generally, these students—and native speakers—are left to resolve analytical matters on their own. Yet by leaving students to themselves, we risk being "positivist, progressivist, and patriarchal."[114] Instead, we may want to use contrastive approaches: responding intentionally to cross-cultural issues will naturally infuse the U.S. legal curriculum with international studies. U.S. legal "logic" is one of many "logics." If we see our logic as others see it, learn the logics of the international community, and compare them all, we will sharpen our analytical tools. Contrastive approaches can illustrate the structure, assumptions, and traditions of U.S. paradigms and thus hasten novices' facility in using them.

113. The nature of the conclusion is not universal; the Japanese conclusion "need not be decisive." John Hinds, Contrastive Rhetoric: Japanese and English, 3 Text 183, 190 (1983) (citing Kazuo Takemata, Genkoo Shippitsu Nyuumon [An Introduction to Writing Manuscripts] 26–27 (Tokyo, 1976)). As one Israeli jurist said, "We teach students to construct the code," not to interpret the law. See generally Donald Schön, The Reflective Practitioner: How Professionals Think in Action (New York, 1983).

114. Raimes, *supra* note 9, at 422 (quoting A. Pennycook, The Concept of Method, Interested Knowledge, and the Politics of Language Teaching, 23 TESOL Q. 589, 613 (1989)).

A. Cross-Cultural Approaches to Problem-Solving

International students bring to the U.S. law classroom analytical paradigms based largely on code-centered legal systems. Each country constructs its code differently; some write rules of construction into the laws themselves; others use implied or traditional rules of construction.[115] Even those international students for whom the common law method is familiar may still experience odd interpretive clashes.[116] South Africa's use of cases differs from Ghana's, which differs from ours.

Our analytical paradigms spring from federalism, the common law, statutory interpretation, and tradition, among other things. These are unknown to the novice. Theoretically, we can introduce analytical paradigms formalistically,[117] explicitly,[118] or by inference.[119] Our basic deductive-inductive paradigms and our newly evolving ones, such as those based on personal experience or deconstruction, differ from those used in other cultures. Generally, for example, the deductive-inductive model differs greatly from the paradigms used in, say, Korean culture,[120] Arab culture,[121] or Japanese culture.[122] Were a U.S. lawyer to go to Vienna and write a legal memo, he would probably

115. The code of Norway relies on traditional interpretations, for example, while the rules of interpretation are written directly into the code of Indonesia. See Thomas H. Reynolds & Arturo A. Flores, Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World, AALL Publications Series No. 33 (1994).

116. What began as a primarily inductive stare decisis approach to legal problem-solving in their country may have evolved into a quasi-code-based scheme that diminished the role of judge-made law. South African lawyers, for example, may have expectations rooted in the old version of the law, which made Parliament the primary source of authority, even though their new constitution may give judge-made law a different role. Either way, they are likely to use cases differently than U.S. lawyers do. English lawyers also realize that U.S. statute drafting creates a different role for cases in the U.S. analytical process than does the English system. But because these systems resemble the U.S. system, the subtle differences may be hard to discern, especially when writing an analysis: the writer is likely to revert to familiar ways.

117. IRAC is the acronym for Issue, Rule, Application, Conclusion that is often taught to first-year students as an adaptation of the syllogism's major premise, minor premise, and conclusion. Road-map paragraphs are often required at the end of the introduction section of a law review article. All these are formalistic tools used to introduce analysis to the novice; unfortunately, students do not always move beyond them.

118. See Pierre Schlag & David Skover, Tactics of Legal Reasoning (Durham, 1986), for some rhetorical preferences used by the U.S. Supreme Court.

119. Questions in class are often used to elicit the court's analytical paradigm. Again, these paradigms are not explicitly labeled as deductive or analogical, for example, but students infer from gaps in the reasoning and from unanswered or unaddressed questions why the court reasoned as it did. Few U.S. lawyers or law students have studied formal logic or rhetoric.

120. See James H. Robinson, Linguistic, Cultural and Educational Contexts of Korea, *in* The Korean Papers: Profiles in Educational Exchange 1 (NAFSA Working Paper No. 10, 1988).

121. See Richard Yorkey, Practical EFL Techniques for Teaching Arabic-Speaking Students (July 22, 1974), *microformed on* Dep't of Health, Educ. & Welfare Nat'l Inst. of Educ. No. ED 117 990 (ERIC); M. Williams, A Problem of Cohesion, *in* English for Specific Purposes in the Arab World: Papers from the Summer Institute on ESP in the Arab World, eds. John Swales & Hassan Mustafa, 118, 123 (Birmingham, England, 1984).

122. See Hinds, *supra* note 35; Nobuyuki Honna, Inferences Often Speak Louder than Words, Japan Times, Mar. 21, 1990, at B2; Richard B. Parker, Law, Language, and the Individual in Japan and the United States, 7 Wis. Int'l L.J. 179 (1988).

import U.S. legal paradigms, even if he were a fluent German speaker. But what he considers "logical" may not be so in Austria.

> If English-speaking writers compose texts in Spanish using the deductive linear discourse pattern of English, at best they will sound simplistic and juvenile, or boring and dry to a native speaker of Spanish. At worse, the writer will project a hidden message of abruptness, even rudeness, insulting his Spanish-speaking reader with a linear, deductive, enumerative composition.[123]

So, in reverse, Korean students might be accustomed to a five-part structure for writing that is based on a form found in ancient Chinese poetry; U.S. analytical paradigms may be difficult to assimilate for the Korean student because they are reader-based, direct, rude, or offensive.[124] Arabs may find U.S. analytical paradigms simplistic or elliptical.[125]

Of course we oversimplify if we categorize rhetorical preferences too generally. No culture's rhetorical preferences can be absolutely stereotyped or generalized,[126] but there are differences among legal cultures. In some countries, Parliament is the supreme authority; in others, the executive. Legal history infuses decisions in some countries, has little effect in others. Judges are fact-finders in some systems, investigators in others, and law-makers in still others.

Importing such ideas—a natural response when entering a new legal discourse community—may have odd results to our eyes. Consider the following

Example A	Example B	Example C
Introduction	Table of contents	Federal statute
Federal law	Federal statute sections	Federal cases, facts
Our situation	Treatise excerpts on topic	State cases, facts
Conclusion	Conclusion	Analogy to facts
State law	State cases listed	Conclusion
Our situation	Conclusion	
Conclusion		
Other side's arguments		

123. Montaño-Harmon, *supra* note 43, at 424.

124. See Robinson, *supra* note 120. For a discussion of reader-based coherence, see Ann M. Johns, Coherence and Academic Writing: Some Definitions and Suggestions for Teaching, 20 TESOL Q. 247, 250 (1986).

125. See Williams, *supra* note 121, at 124. Williams reaches the following conclusions about teaching ESP in the Arab world:

> i. Written Arabic tends to repeat the theme in successive clauses more frequently than English does, even when it is grammatically possible to omit it.
>
> ii. In written Arabic the theme of a clause tends to have the same referent as the theme . . . of the previous clause more frequently than in English.
>
> iii. Written Arabic tends to make explicit inter-class relationships that English leaves implicit.
>
> iv. Written Arabic tends to resist ellipsis.

Id.

126. See Raimes, *supra* note 9, at 420 ("There is no such thing as a generalized ESL student. Before making pedagogical recommendations, we need to determine the following: the type of institution . . . and the ESL student.").

outlines of a memo on violation of an artist's moral right, involving the federal copyright statute, federal cases, and state common law.

The "logic" in Example A, from an Indonesian student, came from a pattern set forth in the Indonesian code itself, according to the student. The French version in Example B, imported by a student from Togo, sets out a treatise-like introduction that orients the reader, then reports on the law itself without analyzing it as the U.S. reader would expect. And the South African analysis in Example C uses cases as illustrations but does not synthesize them into a viable rule first. All three students import their own familiar model into U.S. legal analysis.

The unique relationship among our courts, legislatures, and the executive requires any novice to decipher how the power granted each branch of U.S. government affects the branches' interrelationship: when they are separate, when they interact, and when and why one may predominate. While explaining these relationships may appear to entail only a simple civics lesson, even to the international student, federalism affects every step in research and analysis. It also shapes the analytical paradigm, the schema, or architecture of analysis. The international student must understand the relationships in order to select the appropriate authority for any given genre; usually this involves a long and complex research strategy that is built around federalism. The researching itself must determine the relative weight of the authority, which in turn sets up the analytical paradigm. This complex step in problem-solving challenges all novices.

For example, practices of statutory interpretation are unfamiliar and may seem needlessly complex when introduced. In some legal cultures, plain meaning may serve as the sole source of interpretation: the statute must be presented, the terms defined, the conclusion drawn. In U.S. analysis, plain meaning is one choice for interpreting a statute, but it must be considered with other interpretive principles, such as legislative intent and explicit statements of purpose. For the common law student, principles of common law interpretation may seem transferable, but the interrelationship among the federal circuit courts informs the analytical paradigm differently. Determining how those courts' decisions affect one another, or do not, is more complex than using judges' decisions in a unitary system; the analytical paradigm must indicate the relative weight of authority. The international student's decision-making process must shift, not only in determining the paradigm, but in presenting it.

U.S. students are similarly situated. They arrive from a variety of majors, or discourse communities. Each field of study has constructed a logic and a lexicon unique to its discipline: some students have written graduate theses in psychology, some have written five-page essays in various subjects of the humanities, some have written lab reports, and some have written nothing since high school. They have all lived in the United States, though many may never have come into contact with anyone who worked directly in the legal system. But all native speakers will also bring with them a familiarity with reasoning that will give rise to assumptions about how to reach legal conclusions. Consider the following schemata written by students who are native speakers but novices.

Example D

Question presented

Brief answer, tautological

Federal statutes, quoted; state cases, rule taken from one, quoted

Federal cases, one paragraph per case, each case compared to facts of this problem

State cases, one compared

Paragraphs discussing these facts without reference to cases

Conclusion

Example E

Introduction summarizing facts, nearly quoted from presentation in problem

Federal statute paraphrased

One paragraph listing federal cases, some with quotes, some with holdings, some with policy

Discussion of these facts with occasional mention of federal cases

Conclusion

State cases

One paragraph stating the obvious conclusion

Example F

Facts

Question presented, stating issue exactly as stated in assignment

Secondary sources presented to state the rule

Chronological and exhaustive presentation of all cases

Conclusion

Example D, written by a political science major, separates the sources and analyzes them in a manner acceptable in her previous discourse: illustration and comparison. This version misses the larger "logic" of synthesizing the cases with the statute to establish a more thorough legal basis for comparison. The businessman in Example E does not wish to waste the reader's time stating the obvious. Using the enthymeme, the very logic he is often reading in cases, he assumes that the reader can fill in any skips in the reasoning, and he moves right to the introduction. He also uses an "executive summary" so that the reader does not need to read the entire document. The history major in Example F has done her research and chosen a chronological schema to present all pieces of the research, using the very chronology to establish the conclusion. None of these "logics" is inherently wrong; each is simply uninformed by the subject itself. The transference is natural, but adjusting it to U.S. legal "logic" can seem abrupt, even violent. Our job is to identify the contrasts, welcome them, and assist students in adjusting their repertoire of analytical paradigms accordingly.

B. Language Differences

Our work does not stop with the analytical paradigms. It also includes the language itself. Our understanding of the relationship between the two will sharpen the students' understanding. Neither the international student nor the novice native speaker knows the traditional register, much less MALR. Neither knows definitions of legal terms, and neither has decoded language differences. Novices need all three to gain access to the U.S. legal discourse community.

International students admitted to law schools may not understand or speak English well even though they have scored well on the Test of English as a Foreign Language.[127] The TOEFL is based on standard English and does not test usage of the special features of the U.S. legal register; even excellent scores on so-called standard English tests may not guarantee good performance in law school. Similarly, native speakers have difficulty manipulating the legal register during the first year of law school. We can teach register not as a question of remediation[128] but of demystification, and demonstrate how it is the language of a legal culture's logic.

Many legal cultures eschew the written word, depending instead on oral presentations to flesh out analysis.[129] Legal texts are primarily the law itself, usually in the form of a written code. Legal language, then, is *the law,* and other legal texts are abbreviated communications about that law, or even repetitions of it.[130] Even then, the treatment of the legal text will vary among cultures, some using the text verbatim in most legal communications, others assuming the reader understands the text and therefore not including it in most communications. The language of the legal analysis, then, may consist of a quotation of the law and a conclusion; similarly, in cultures where the attorney makes the decision, not the client, the language of the legal analysis may be a brief paragraph of advice. These cultural traditions affect not only the analytical paradigm, then, but also the lawyer's treatment of legal language.

This is important. Linguistic fluency in the target discourse community depends not just on understanding analytical paradigms or English syntax, but also on understanding how lawyers in the target community use lan guage. Some understanding will inevitably result from reading U.S. legal

127. See Theodore V. Higgs & Ray Clifford, The Push Toward Communication, *in* Curriculum, Competence, and the Foreign Language Teacher, ed. Theodore V. Higgs, 57, 58 (Skokie, 1982).

128. See Swales, *supra* note 16, at 2 ("For if there is one factor that has debilitated academic English programs more than any other around the world, it has been the concept of *remediation*—that we have nothing to teach but that which should have been learnt before.").

129. See Jeffrey L. Slusher, Runic Wisdom in Njal's Saga and Nordic Mythology—Roots of an Oral Legal Tradition in Northern Europe, 3 Cardozo Stud. L. & Literature 21, 33–36 (1991); Walter Otto Weyrauch & Maureen Anne Bell, Autonomous Lawmaking: The Case of the "Gypsies," 103 Yale L.J. 323, 374–80 (1993).

130. See Bhatia, *supra* note 65, at 227.

sources, analyzing U.S. legal paradigms, and listening to U.S. lawyers speak. But understanding how U.S. lawyers use legal language goes beyond syntactical concerns.

Such concerns were, of course, the sole focus in earlier studies of international students. Most of those studies focused on syntax, lexicon, and usage.[131] Some research uncovered specific problems with English that fell into patterns. In one study, for example, Arab students had difficulty with punctuation, English cohesive devices, and proper repetition of terms; in another, Japanese students had difficulty with articles, particles, and spelling;[132] in another, Spanish students had difficulty with sentence structure, punctuation, and vocabulary.[133] Such information may be helpful in the most general sense, but these studies, done outside the legal community, do not indicate how each international law student will bring to the classroom a unique treatment of text or style.

U.S. novices may have developed their writing in other registers and may encounter a similar language difference. Musicians may be using language that describes musical forms and performance; engineers may have used language minimally to identify, rather than explicate; and historians may have used language that described and characterized historical activities. A native speaker's "style" may have been built elsewhere, and her use of language may not transfer easily.

Composition theorists have several theories of style, each of which has been used in referring to legal writing. Of the theories propounded, the most useful in teaching novices in our discourse may be that of *aesthetic monism.*[134] This theory suggests that stylistic choices are informed by the content of the work and that the writer must select language according to the document's content. In other words, scientists are going to choose language that is appropriate for describing findings in experiments involving certain substances; the language will describe the substances but also reflect appropriate procedures for the experiment. No one is writing a novel here. Similarly, lawyers select language from the law. For example, the verb phrase *offered no reasonable explanation* will be used in a res ipsa loquitur analysis when courts in a particular jurisdiction develop that phrase for determining liability. And the noun phrase *separate activities* will be used with the verb *aggregate* in analyzing certain provisions of the tax code.

The placement of these words within sentences and paragraphs is also often dictated by the law itself or the direction of the analysis. For example, if

131. See, e.g., Bialystok, *supra* note 9; Silva, *supra* note 9; Heikki Nyyssönen, Lexis in Discourse, *in* Nordic Research on Text and Discourse: NORDTEXT Symposium, eds. Ann-Charlotte Lindeberg et al., 73 (Abo, 1992).

132. Ryan, *supra* note 38; see also Honna, *supra* note 122.

133. See Montaño-Harmon, *supra* note 43.

134. See Elizabeth D. Rankin, Revitalizing Style: Towards a New Theory and Pedagogy, *in* The Writing Teacher's Sourcebook, 3d ed., eds. Gary Tate et al., 300, 305 (New York, 1994) (defining three theories of style: *rhetorical dualism,* which sees language and thought as separate entities; *aesthetic monism,* which sees style and form as an inevitable consequence of content; and *psychological monism,* which sees style as the expression of a unique personality).

my analysis of res ipsa loquitur depends on showing what could not have caused the accident, I can put that information in one paragraph or section, using a syntax conducive to lists, such as parallel structure or tabulation. I can introduce the list with "Defendant can *offer no reasonable explanation* for his maintenance of the following." Thus the building of the register requires conscious choice of syntax and words, choices that fit the analytical structure of the doctrine. If a balancing test is used for an analysis, the register calls for some symmetry—whether between sentences, which may introduce the rule; paragraphs, which may develop analogies between cases; or sections, which may reach conclusions about subsets of the doctrine.

We simply need to say this and illustrate it. As lawyers, we have created a *lexicon,* that is, a vocabulary unique to our discipline. We have also created certain *syntactical preferences* that explain the legal relationship among ideas. And we have created specific *genres* that work for specific purposes, such as memos that inform, briefs that persuade, motions that seek to get action. All novices can learn to interpret the traditional legal register by learning its vocabulary and syntactical patterns and by comparing it to that register they have most recently used. Then they can translate their writing into the Modern American Legal Register as they become more experienced and adept.

C. Using Contrastive Approaches in the U.S. Law Classroom

Contrastive approaches invigorate any classroom. By comparing legal systems and analytical paradigms across cultures and disciplines, we set the U.S. legal discourse community in sharp relief. By contrasting, we give students reference points for learning, analyzing, and remembering. To use contrastive techniques, we do not need to know everything about other disciplines and legal cultures—students will provide the comparisons—but we can incorporate references regularly.

According to schema theory, our current emphasis on bottom-up processing does not explicitly introduce the discourse community, its analytical paradigms or register. That is, the information gathered does not lead to generalizations about the discourse community as such, but rather to generalizations about U.S. legal principles and rules.[135] And by failing to be explicit, we do not provide novices an opportunity to use any top-down processing, so they have only half a chance to retain the knowledge, and they will learn more slowly. They may learn very little if the new information is so unfamiliar that the novice cannot attach it to schemata acquired by previous experience.

To compensate for the slower process, some teachers vary strictness and standards remarkably when dealing with novices.[136] This approach does not seem to hasten students' acculturation into the discourse community; in fact,

135. The casebook approach of bottom-up processing echoes what a lawyer must do in working with a client: take data and process it into general principles that will assist the client. No longer, however, is this the exclusive paradigm. Because our laws and genres also use top-down processing through statutory law, there should be a prominent place for this in the U.S. law classroom.

136. See Santos, *supra* note 6, at 81–84.

it could prevent it. Some teachers may keep the standards the same and simply give international students low grades. This approach, too, seems to keep the discovery process secret and keep those students from acculturating.

We have other choices. We can introduce general principles that foster top-down processing. Top-down processing creates a "click" in learning; in fact, that click that some law students describe is probably the moment when bottom-up processing intersects with top-down processing, when the data fit the concepts and vice versa. The click comes late in the first year or in the second year for U.S. novices. For the international student, it may not happen at all within a one-year LL.M. program unless we provide some general, or top-down, information. We can do so, for example, by introducing discourse community principles and definitions. And by using contrastive approaches, we can anticipate all novices' needs, keep our standards consistent, and open our classrooms and our students to international issues.

Contrastive Approach 1. Characterize the features of the U.S. legal discourse community.

We can define the U.S. legal discourse community, its paradigms and register. We can also suggest guidelines for what students may expect to find as they read cases and statutes. And we can focus students on the role of federalism in analysis, especially at the beginning of the course. Because it is unique and informs much of the reasoning of cases, we can make more explicit the relationship between federal and state governments. As we discuss a federal case, for example, we can refer to its relative authority by explaining its source in the Constitution or by contrasting it to the role of judge-made law elsewhere. If an international student has indicated a willingness to speak about his legal system in class, we can ask him to explain the differences. We can also note them ourselves: "Just so you know, while judges here are 'fact-finders' at the trial level, some judges in Italy literally find facts, conducting discovery themselves." This approach will draw international students into the discussion and expand their general understanding of U.S. legal discourse. Such a contrastive approach avoids the U.S.-centric approach that may seem to elevate our system above others.[137] It primes all students to understand more precisely the various rhetorical preferences that constitute "logic."

We can also promote critical reading by annotating some of the cases to identify features of the discourse, such as using the hierarchy of primary and secondary authority, using primary before persuasive authority, using analytical paradigms that match traditions and doctrines, identifying the relative weight of authority, placing terms of art in positions of emphasis, and using citations in text. In addition, we can identify faulty reasoning by using terms

137. Raimes, *supra* note 9, at 418 (citing R. E. Land & C. Whitley, Evaluating Second Language Essays in Regular Composition Classes: Toward a Pluralistic U.S. Rhetoric, *in* Johnson & Roen, *supra* note 53, at 286). There is extensive research that warns against a narrow use of contrastive rhetoric as emphasizing only prescriptions aimed at countering L1 interference. *Id.*

that relate those faults to specific analytical paradigms and to students' cultural or discoursal expectations.

Better yet, we can design the course to introduce not only the subject matter but also the development of U.S. legal discourse. For example, we can suggest that what was primarily a common law system with an analogical schema has now become primarily a statutory-regulatory system that uses newly evolving paradigms of statutory interpretation. We can introduce these concepts early and ask students to identify or characterize them throughout the semester. And on the exam we can ask students to use a specific paradigm to answer the question, e.g.: "Using a feminist jurisprudence argument, explain how the new statute will apply to the facts above." As we explicitly characterize the U.S. legal discourse community, we are likely to evoke reactions from students who, by offering comparisons from their own disciplines or legal cultures, will sharpen the descriptions of our logic and its basis.

Contrastive Approach 2. Learn or discover the analytical paradigms used by various disciplines and legal cultures.

Our students do the work for us here; we need only ask. We do not need to research the structure and analytical norms of every discipline or legal culture. Rather, we can begin our understanding by asking about the systems represented by students in the current class. Such a technique not only narrows the basis for our research, but also welcomes students to the classroom. We can ask those students to describe the features of their disciplines or systems as a comparative base line. If we are less ambitious, we can select legal systems that represent three or four general differences from the U.S. system, such as a Napoleonic Code country, a common law country, and a country whose legal origins are partly tribal and partly colonial.[138] Such a variety can give to U.S. law context, comparative value, and international significance.[139]

For novices, even general discussions about comparative legal systems and their analytical paradigms can be helpful, especially if presented intentionally as data to be processed bottom-up or as qualified generalizations to be processed top-down. And we can explore the more subtle aspects of the analytical paradigms by using specific examples during the usual discussions about U.S. legal analysis. As each new paradigm is analyzed, the novice can

138. We can characterize the U.S. legal discourse community by comparing it to others, some cues of which are in Table T.2 of the Bluebook. A Uniform System of Citation, 16th ed., 229–79 (Cambridge, Mass., 1996). If we do so, we by definition activate the schemata of novices. As a matter of classroom discussion and discovery, we can ask students how such approaches compare to what they do in their disciplines or legal cultures. We may want to check ahead of time to make sure the student is sufficiently comfortable with defining the discipline or legal culture to respond in class. Or we may want the student to explain in private some of the differences so that we can incorporate these ideas into the classroom ourselves. Year by year, students can add to our knowledge of how other disciplines and legal cultures operate.

139. If so inspired, we can research major legal cultures as matters of comparison. Commercial law materials can include specific information about major trade partners such as Japan, France, and Mexico. Torts materials may show how the codes in some countries handle the same topic. Contrastive discussions can be sprinkled throughout the semester; they need not be constant. But the contrast should put in relief the U.S. rhetorical preferences introduced in that classroom.

compare it to those that are familiar to him.[140] Then he can fit the reasoning paradigms into a larger framework and master more complicated and sophisticated approaches.

Contrastive Approach 3. Use contrasting analytical paradigms in legal problem-solving.

Because logic is rooted in culture, contrasting analytical paradigms may uncover better solutions to legal problems. Once we define and illustrate some typical U.S. paradigms, we can introduce other paradigms, using examples from other disciplines and cultures. We can include in our course materials rules of statutory interpretation that are themselves part of a country's code. We can then contrast those rules with the unwritten rules here. Students can discuss or write responses to the question "Which result is more 'logical' and why?" We can use U.S. cases as examples of analogical reasoning, then show how a judge in a code-based country reaches a conclusion using not analogy, but plain meaning. Or we can introduce a family of cases construing a U.S. federal statute, then a group of cases construing a code provision elsewhere. We can illustrate the analogical reasoning in each U.S. case and the stare decisis development of a rule as the U.S. cases are read together; we can then show how the cases construing a code provision do not necessarily refer to each other, but to a fresh interpretation of the code provision. Then we can assign a short writing assignment requiring students to "reason," using each paradigm.

Use of contrasting paradigms can illustrate stare decisis principles in a first-year course or illustrate trade practice trends in an advanced international trade course. Students can then apply contrasting paradigms by, first, reading foreign statutes that cover the same material covered in the class text and, second, writing out how they think a foreign court will construe the statute. Then we can offer an actual case construing that foreign statute, which can start a discussion on "logic" and its cultural bases.

Contrastive Approach 4. Demonstrate contrasting treatments of legal language.

An international student may import his own text treatment. He may read a U.S. statute, look up the words in the dictionary, and present his conclusion. He may in fact cite the dictionary while doing so. Or he may find a judicial definition that he particularly likes and use it, despite modifications to that definition in subsequent cases. Or he may select certain terms that seem to define the doctrine and miss others because he is not sure of the difference between holdings and dicta. A U.S. novice may treat text similarly.

All novices need to know how U.S. lawyers define and use legal language. With the students we can examine legal texts for their use of terms of art and illustrate how U.S. lawyers and judges draw terms from statutory language and

140. Cf. Montaño-Harmon, *supra* note 43. The international student may begin by contrasting U.S. analytical paradigms with her native culture's paradigms, then compare U.S. paradigms to each other as she collects more. In her writing, then, she will have choices of paradigms from which to choose.

from previous cases examining the legal subject. We can then illustrate how the terms are defined by drawing on several sources: previous cases that examine the topic; traditional methods of examining language, such as canons of construction; scholarship that analyzes the topic; and even the dictionary. We can also examine other texts, such as articles or memos, and note where terms of art appear, how they are positioned syntactically, and when and why they best advance analysis.

To contrast treatment of text, we can assign students to construct a paragraph that defines a term of art used in an assigned text. Students can then suggest places within the analytical paradigm where the term of art can best be used. They can also discuss the level of detail necessary to explain the terms to the U.S. audience, according to purpose, audience, and genre. The definitions might need more explanation and repetition in a new area of law—more detail for an inexperienced audience, or more reiteration to persuade in a brief. In general, U.S. legal paradigms may require more definition and explanation of legal language, more reiteration and detail. The phenomenon of federalism generates more information than most members of the U.S. legal community can digest and remember. Genres within the U.S. legal community are designed to expedite information exchange, and the detailed and specific treatment of text is essential to that exchange. International students will find some similarities here, some differences; their focus on contrasting treatments of legal language will heighten their ability to use it effectively. U.S. students can compare such genres to those they know, learning what to keep and what to leave behind.

Contrastive Approach 5. Offer more detail.

The contrastive approaches above will serve both to internationalize the classroom and to hasten acculturation into the legal discourse community. But novices may need further attention outside the classroom.[141] Assumptions inherent in an expert's understanding of U.S. legal culture may be missing for international and U.S. novices. In understanding how U.S. lawyers treat text and set up analytical paradigms, novices may themselves need more definition, more illustration, and more examples. While we teachers may not be able to spend extensive class time explaining differences in legal systems, paradigms, and texts, we can provide detail through handouts; course materials that include charts, illustrations, definitions peculiar to that subject matter; research hints for that subject matter; or supplementary sessions.

Contrastive Approach 6. Address why students are here and avoid condescension.

We should also be aware of students' motivations. Personal variables will affect their learning capacity.[142] In the law classroom, these variables can affect

141. See Ann M. Johns, Written Argumentation for Real Audiences: Suggestions for Teacher Research and Classroom Practice, 27 TESOL Q. 75 (1993).

142. See Francine Schumann & J. Schumann, Diary of a Language Learner: An Introspective Study of Second Language Learning, *in* Teaching and Learning English as a Second Language: Trends in Research and Practice, eds. H. Douglas Brown et al., 241 (Washington, 1977). Personal variables can either promote or inhibit second-language learning; among those variables are what the authors identify as nesting patterns, transition anxiety, rejection of teaching methodology, or maintaining a personal agenda in learning. Identifying these variables can assist the law teacher in diagnosing the causes of learner problems and in suggesting solutions or alternatives. .

teaching decisions. For example, if an international student intends to return immediately to his country, then some formal and lexical concerns can be ignored or dealt with preemptively.[143] But immigrant students who intend to stay in the United States need native-speaking proficiency. If students in a class have mixed goals, then we may want to get them to agree on a common standard, agree ourselves to address all students' individual needs, or combine the two by teaching to the agreed-upon standard in the classroom and meeting individually with those students who request it.

We need to consider other motivations and account for them in the classroom. For example, a student who holds a personal agenda may resist assignments that do not fit with that agenda: someone who expects to return to his corporation to practice law may be interested only in assignments having to do with corporate law and may simply refuse to do other assignments. A student who has never had a female teacher before may not take her instructions seriously. And a student who is experiencing transition anxiety may be unable to absorb enough information to produce a paper or write an exam.[144] Personal variables will also include the rate at which each student absorbs information.[145] Further, international students—and novice U.S. students who feel that they are studying a new language—may also experience a silent period similar to that of second-language learners.[146]

143. These include such details as perfecting citation form, mastering the use of English articles, or learning the Rules of Appellate Procedure. See Raimes, *supra* note 9, at 414.

144. See Schumann, *supra* note 5.

145. > [A]ttitudes and motivation and language aptitude are important because they influence the rate at which second language material is learned. When initially confronted with new second language material, both high aptitude subjects and those with positive attitudinal/motivational characteristics do no better than their counterparts with low aptitude and/or low attitudinal/motivational attributes. Both groups show superior learning, however, so that by the third trial they are performing significantly better than their counterparts, and the difference continues to widen.

    See R. C. Gardner et al., The Role of Attitudes and Motivation in Second Language Learning, 35 Language Learning 207, 225–26 (1985). Over time, then, highly motivated law students will pull away from less motivated ones unless the professor is aware of these differences and anticipates them in his teaching.

146. John Gibbons experimented with young children doing second language learning, where English was the second language, and analyzed what has been known as the silent period. Previously it was thought that this period was necessary for intake and acquisition before speaking, and that the curriculum should therefore allow for the silent period. Gibbons suggests that (1) the initial silent period probably begins at the period of silent *in*comprehension, (2) if the silent period is prolonged, this may be a result of psychological withdrawal rather than language acquisition processes, and (3) consequently initial silence in the language curriculum is not necessarily desirable. The Silent Period: An Examination, 35 Language Learning 255, 255 (1985). This may apply to the silence of adult learners in a new discourse community. There is a need for intake and acquisition of vocabulary, paradigms, and so on. But, prolonged, this period may harm the new learner who needs to speak and write in the new discourse. This also suggests that ESL learners in a new discourse community ought not to have courses where speaking is not required and the only writing is in the exam at the end of the course. This seems a good example of withdrawal causing harm to the learner. Result: law schools should definitely have writing courses with few students so that each student is required to speak and write frequently.

To anticipate these variables, we should make clear at the beginning the course's objectives. We may also ask each student to meet with us individually to discuss those objectives and personal objectives, assuring the students that we will do our best to meet common objectives. We may then make explicit in class what the collective objectives are, then refer to those repeatedly as new concepts are introduced. Then each student may feel more invested in the course, more secure that the course is meeting her own objectives, and more motivated to pursue the course's objectives.

We should also avoid any tendency to be culture-centric or condescending in dealing with international students.[147] Both can block learning. Instead, we can use the U.S. legal system as the target system but not the only system. We can also ask what differences students anticipate in studying this system, and we can make explicit known cultural differences. For example, we can announce on the first day that, in the United States, we are very *informal* in our classroom teaching and our conferences with students, but very *formal* in our expectations of the written product.

By using contrastive approaches, we may allow students to see the variables themselves. Our teaching is simply calling on age-old techniques of comparing and contrasting. Yet, at the same time, it is infusing the U.S. law classroom with information about comparative legal cultures, it is validating the disciplines our students come from, and it is equipping them to join and enrich the U.S. legal community.

III. Special Considerations for the International Legal Writing Classroom

The international student's most explicit initiation into the U.S. legal discourse community may occur in a legal writing course. While this is an excellent situation for an introduction to contrastive approaches, acculturation will move more slowly if this is the only course in which comparisons are made. Students need reinforcement, repetition, and varied perspectives to understand our discourse community, especially within a one-year program. The most powerful model is a combination of what has been discussed so far with explicit applications intrinsic to the field of legal writing.

As legal writing experts, we can benefit explicitly from the theory and expertise developed by teachers of ESL writing, who suggest the following methodology. Generally, students need a syllabus designed both to introduce new concepts in comparison to familiar ones and to take advantage of their already acquired abilities.[148] We should also design a syllabus around clearly

147. See Raimes, *supra* note 9, at 416.

148. "A greater ability to use one's knowledge productively was found when the more difficult [teaching] structure was presented." Susan Gass, From Theory to Practice, *in* On TESOL '81: Selected Papers from the Fifteenth Annual Conference of Teachers of English to Speakers of Other Languages, eds. Mary Hines & William Rutheford, 129, 139 (Washington, 1982). Gass suggests that

> a more efficacious model for syllabus design in this case would be one in which a more difficult structure preceded an easier one. We need to take greater advantage of the "natural" abilities with which learners come into the classroom, because these abilities can facilitate the learning process. When the textbook order contradicts a learner's natural orderings, inhibition of the learning process may result.

Id.

defined goals for proficiency in the U.S. legal discourse community.[149] This requires research. We must know something about the students' backgrounds, previous experience in other discourses or legal cultures, and ultimate reasons for attending the class. From that information, we can design a syllabus that meets the needs of all students.[150] Class size should be held to about twelve students, so that students have ample opportunity to speak, ask questions, work in peer groups, and write in class.[151]

A. Using the Process and Social Approaches

In the legal writing class, both the process and social views offer effective approaches for international students.[152] The process approach allows students to explore their own writing in a manner that maximizes learning. They learn not only the standards, paradigms, and formal conventions of the product or specific genre in the target community, but also the techniques by which it is produced. The process approach alone has been used in ESL classes;[153] the social view suggests that individual processes be placed in the context of the target community's requirements.[154] Only when students understand the peculiar restraints of audience, lexicon, genre, register, and analytical paradigms can they produce acceptable work. To concentrate solely on their processes, especially as used in their own legal cultures, might be to do them a disservice, particularly if they are immigrant ESL students. But to begin with their processes and to monitor any transfers or adjustments in the processes as they adapt to U.S. legal culture might be very useful.

Students can create a process chart on the first day, discussing how they have produced written documents in other legal settings.[155] Then each student can meet individually with the teacher to discuss previous writing experiences; any questions they have about U.S. legal writing; their process goals,

149. There appears to be a real danger of leading the students too rapidly into the "creative aspects of language use," in that if successful communication is encouraged and rewarded for its own sake, the effect seems to be one of rewarding at the same time the *incorrect* communication strategies seized upon in attempting to deal with the communications situations presented. When these reinforced communication strategies fossilize prematurely, their subsequent modification or ultimate correction is rendered difficult to the point of impossibility, irrespective of the native talent or high motivation that the individual may originally have brought to the task.

Higgs & Clifford, *supra* note 127, at 74. In a legal writing curriculum, then, using analytical paradigms and register at appropriate levels is crucial to pacing students' learning.

150. See Thom Hudson & Brian Lynch, A Criterion-Referenced Measurement Approach to ESL Achievement Testing, Language Testing, Dec. 1984, at 171.

151. See, e.g. Kathleen M. Bailey, An Introspective Analysis of an Individual's Language Learning Experience, *in* Issues in Second Language Acquisition: Selected Papers of the Los Angeles Second Language Research Forum, eds. Robin C. Scarcella & Stephen D. Krashen, 58 (Rowley, 1981); Ann Raimes, Exploring Through Writing: A Process Approach to ESL Composition (New York, 1987).

152. See Rideout & Ramsfield, *supra* note 11, at 51–61.

153. See, e.g., Raimes, *supra* note 9.

154. See Connor-Linton, *supra* note 9.

155. Sample process charts and class syllabi are available on request from the author.

such as getting over writer's block, researching more efficiently, or rewriting more effectively; and any other goals they may have for the course. During class, we can relate specific tasks to the process, such as researching strategically or revising effectively. We can use peer groups to discuss not only the written product but also the process by which it was produced.[156] Thus students can develop techniques for working effectively in the U.S. legal environment,[157] share ideas about strategies, and learn how to edit themselves more critically.[158]

156. See Allaei & Connor, *supra* note 34, at 24–26. Allaei and Connor have used cross-cultural peer response groups extensively in writing courses for non-native English speaking students. They discovered that the overwhelming majority of students enjoy interaction with their peers, finding that the input they receive from them is helpful when revising writing. These interactions can work for non-native speakers as well as between native and non-native speakers. There are three areas of concern. First, some students (mostly East Asian) are uncomfortable making negative statements about their peers' writing, probably because they are relying heavily on the deference/politeness strategy. Second, some students (mostly Middle Eastern) express reluctance about being asked to share their writing, especially if it is expressive. Third, some students feel constrained by weak language skills.

    Allaei and Connor suggest, then, that in order for collaborative peer response groups to be successful:

    - Students must understand why they are being asked to participate in these response groups.
    - Students should work in group activities that allow them to interact in nonthreatening ways such as brainstorming, discussing readings, discussing scenarios, and discussing cross-cultural differences.
    - Students should have models for ways they can respond to their peers' writing. This can be done by reading essays aloud or bringing examples to class and emphasizing reactions as readers, not critics.
    - Students should choose their own response groups.
    - The first peer response group should be as nonthreatening as possible.
    - Students should get some of their own agenda, such as questions on their writing, into the response group.

157. See Connor-Linton, *supra* note 9, at 45. The author created an experiment to increase students' pragmatic analysis and discovered that by using this technique students actively discovered conclusions for themselves, learned a methodology for self-instruction and improvement of communication skills, and learned a way to think and teach themselves about using their second language.

    > The students' own observations point out one value of the approach: a learner discovers what is important to her at that point in her individual development. The focus is shifted from the teacher and the teacher's way of seeing writing to the students and their way of seeing writing. . . . This concrete approach to revision forces student writers to consider the effect of their language choices on their readership.

    Id. "Pragmatic analysis in the second language writing classroom requires students to rely on each other, to develop strategies for using their peers and problem-solving in the second language." *Id.*

158. *Id.* In studying ESL papers for cohesion, reference, persuasion and relative abstractness, Connor-Linton had students read each other's papers. He notes that a particularly effective communication strategy employed by the students was playing a role, which gave the student writer

    > a voice, a consistent style, and that style helps the student writer to organize her understanding of her topic. It guides what the writer writes about, and how. This voice is often what is missing from second language speakers' utterances and writing; it is what often makes their utterances sound

B. Responding to Writing

How we respond to students' writing defines how we will usher them into the discourse community. It is here that we can teach both analytical paradigms and register. It is here that comments specific to the genre can be tailored to each student's presentation; it is here that the journey from one legal culture or discipline to another reveals itself. Essential to responding effectively is formulating a clear set of goals, not only for the course but also for each project. Otherwise, there are too many aspects of the paper to respond to, and the student will absorb little.[159]

We can establish such goals as building confidence and imparting information about the discourse community.[160] Comments can then ask specific questions, give specific directions,[161] or suggest specific alternatives. While lexical concerns were the traditional area for responding,[162] they should not be the primary focus under the process and social views. Comments may instead be tied to places in the process that should be set aside for reviewing, editing, or proofreading for accuracy.[163] Probably paramount for the novice will be comments on coherence, for these reveal the writer's progress in understanding analytical paradigms. We can use each assignment to explore paradigms of statutory analysis, case analysis, or persuasion, for example. Then the student can measure his paper by examining examples discussed in class. Our comments should intersect with both class discussions and our understanding of the student's goals and previous training. The assignment and the comments should be designed around the same goals for coher-

inappropriate to native speakers and may even contribute to crosscultural miscommunication, or crosstalk.

Id. at 46 (citing John J. Gumperz, Discourse Strategies (New York, 1982)). ESL students who entered into this project had a good grasp of the mechanics of written English, and they did know Western essay structure, but their writing lacked cohesion and a consistent style. Connor-Linton concludes that second language learners may learn easiest when they can ventriloquate a specific others' use of the language, where they can play a role.

159. See Donald Knapp, A Focused, Efficient Method to Relate Composition Correction to Teaching Aims, *in* On Teaching English to Speakers of Other Languages, ed. Virginia French Allen, 149 (Champaign, 1965). Knapp states four assumptions: that composition teachers should not be proofreaders; that it is a mistake to mark all the mistakes in a composition; that the correction of grammatical errors is only a subsidiary aim in teaching composition; and that giving a composition a grade is unnecessary and undesirable. Instead, the composition teacher needs to instruct on just a few items at a time and reinforce those and then move ahead to some others. *Id.*

160. See Nancy Sommers, Responding to Student Writing, 33 C. Composition & Comm. 148 (1982) (describing goals and strategies of commenting on, not "correcting," students' papers).

161. See Raimes, *supra* note 9, at 420.

162. See Robinett, *supra* note 3, 244–47.

163. See Ray & Ramsfield, *supra* note 91, at 234–37, for a possible checklist or approach to responding to student writing. This entry, entitled "Principles of Good Legal Writing," may be adapted for international writers.

ence.[164] The following approach, created by Ann Johns, can be adapted for international students.

Lesson 1. Deconstructing the assignment and preparing a thesis.

1. What is the function of the first sentence in the instructions? What is the audience asking you to do?

2. What do the instructions tell you about your writing task? What do they tell you about the required aims or strategies for writing?

3. What do the instructions tell you about the focus of the content?

Lesson 2. Examining a thesis and the relationships among assertions.

1. Is the thesis in the paper appropriate for the instructions provided?

2. What does the thesis pre-reveal to the reader? Does it reveal the writer's argument and the organization that the argument will follow?

3. What are the relationships among the assertions?

4. How do you think the ideas presented in the [sample ESL] essay would affect the reader, a native-speaking teacher?

Lesson 3. Examining the information structure.

1. Did the actor link sentences through use of vocabulary? Are there related words which appear throughout the paragraph? How are these words related (by synonymy, as superordinates/subordinates, etc.)? Is the linking of vocabulary successful, or are there words that don't fit?

2. What reference items are used? Does the writer use *this, the,* or *it* to provide a tie with earlier sentences? Are the reference items appropriately used? Do they lead you through the text?

3. What types of conjunctions are there?

4. (a) What meta-discourse items appear in this essay? Are they effectively used? (b) What other items might be necessary, considering the instructions and the information in the essay?[165]

C. Holding Conferences

Accompanying written responses should be conferences with novices to examine not only the product, to which the comments are directed, but also the process. Each student has been faced with a series of decisions in producing the document: where to begin, what sources to use, what order to put them into, what definitions to include, and so on. The conference allows us to

164. Johns offers a lesson in teaching coherence using top-down processing by having the class "consider coherence systematically in terms of prompt [instructions] requirements, thesis development, the relationships among assertions and to the thesis, and the adequacy of the information structure. Only in the final stages do students edit for sentence-level errors." Johns, *supra* note 141, at 252.

165. See *id.* Johns uses the term "prompt" to signify the body of instructions given to the students to induce the writing of an essay. I have changed the term to "instructions" to adapt the list for legal writing. The text is Johns'.

explore with the student that decision-making process, examining *when, how,* and *why* the student made her choices. Both the product and the process can improve; better yet, effective techniques can be transferred to the next project.[166]

The purpose of the conferences is to allow students to negotiate meaning through interaction with a resident of the target discourse community. To be successful, this negotiation must begin with strategies introduced in the classroom.[167] We must suggest rhetorical goals, such as understanding the purpose of the document, framing the document for a specific legal audience, or limiting the scope of a particular genre. Then discussions about decision-making in the legal writing process can focus on these rhetorical concerns, as students explore their decisions. Working with students of different cultures or backgrounds, we must develop some virtuosity in discussing these techniques. Negotiating meaning is negotiating a path from one culture to another; working together along that path requires some knowledge of both the beginning and the target cultures.

* * * * *

By seeing the U.S. legal culture as a specific discourse community into which students enter, we can use contrastive approaches to enliven class discussion. Every law course can, in part, become a comparative law course. US. students will become more sensitive to international issues and probably more agile in understanding the U.S. legal system. International students will acculturate more quickly into the U.S. legal community and see more clearly the comparisons with their own.

What we consider "logical" may be a U.S.-centric notion of how ideas progress. This "logic" may be tied to U.S. English and to the U.S. legal discourse community itself. If we are to think internationally, we would benefit from knowing how international lawyers think. If we are to think holistically,

166. See Lynn M. Goldstein & Susan M. Conrad, Student Input and Negotiation of Meaning in International Writing Conferences, 24 TESOL Q. 443 (1990). The authors found that when teachers generated most of the input during conferences by nominating the topics, doing most of the talking, or using questions to engage, the student "backchannelled," or merely reacted, rather than setting the agenda, making his needs known, expressing ideas and asking questions—the claims made for conferencing. *Id.* at 455. "Thus, while a student *may* contribute input to the conference, *may* set the agenda, and *may* negotiate meaning, these are not guaranteed—even in conferences with the same teacher." They also note that the teacher may subconsciously behave in ways consistent with her expectations of the students. *Id.* at 456.

167. *Id.* at 455. "In addition, as members of diverse cultures, ESL students come with rules of speaking that may conflict with those of U.S. classrooms and with those that teachers might like to see operate in conferences. . . . Students may have also acquired rules of speaking from typical U.S. classrooms that may also conflict with those of the conference." Both of these may contribute to some students' speaking more than others during the conference. The authors conclude that conferences do not necessarily do what the literature claims they do: result in student input, result in revision, or generate successful revisions. *Id.* at 456. Instead, negotiating meaning is what makes a conference successful. Negotiation requires a student to be more actively involved in the discussion, either by asking questions or answering them, which may lead to better retention and revision. Thus ESL teachers need to examine their own behaviors and move beyond an assessment of the effectiveness of conferences based on student and teacher attitudes. *Id.* at 459.

we would benefit from knowing how our entering students think. They import their acquired "logics" into our community. We have been asking them to build a new schema—our "logic"—from scratch. We have been asking them to construct meaning from notions that may look eerily similar to those in their previous analytical worlds but really are insidiously different.

Using contrastive approaches requires some thought about other legal cultures, some research into the students themselves, some more attention to detail, and some new points of view. But we may get better results, and sooner: better class discussions, better written responses to exam questions, and a clearer understanding of the differences among legal cultures. Such contrastive approaches may be, after all, our most "logical" choice.